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JUDGES OF THE HIGH COURT.

JULY—DECEMBER, 1926.

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PRIVY COUNCIL.

[On Appeal from the High Court of Judicature at Bombay.]

PRESENT:—VISCOUNT DUNEDIN, LORD SHAW, LORD SUMNER, SIR JOHN EDGE AND LORD SALVESEN.

Maneckji Pestonji Bharucha and another ... *Appellants**

v.

Wadilal Sarabhai and Company and Maganlal Chunilal Ghia ... *Respondents.*

Indian Contract Act (IX of 1872), Ss. 76, 78, 83, 95 and 121—Contract for sale of shares—Delivery of share-certificates and signed transfer to purchaser—Purchaser's cheque in payment thereof dishonoured—Vendor's claim to lien—Rules of Bombay Stock Exchange.

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Notwithstanding that a company, by its Articles of Association, may provide that only a shareholder registered as such in its books will be considered by it as the owner of the shares, possession of the share-certificate, together with a transfer duly signed by the registered holder, constitutes a good title to the shares inclusive of the title to be registered as owner in the books of the company.

Shares in a company are "goods" within the meaning of S. 76 of the Indian Contract Act (IX of 1872), and accordingly a contract for the sale of shares generally in any particular company or undertaking, without specification of their serial numbers, become complete, under S. 78, upon delivery to the purchaser of the share-certificate and the relative transfer duly signed by the registered holder, and the purchaser on his part accepting the shares thus ascertained and paying for them (S. 83.)

If such payment be by cheque, which, on presentation, is dishonoured, the vendor's only remedy is in respect of the amount of the cheque, or the unpaid price of the shares. He has no *jus in re* in respect of the share-certificates or the signed transfers, nor any lien upon them, for his lien ceased when he parted with the possession (S. 95).

Rule C of the Bombay Stock Exchange whereby, if the cheque in payment of shares sold be dishonoured, the shares are to be returned to the vendor for

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re-sale the following day, is not intended to make delivery of the share-certificates or transfers conditional upon payment; for delivery being a fact, an effectual sale takes place under S. 78, in virtue of it, and the aforesaid rule does not over-rule the statutory revision of S. 78, nor amount to an express stipulation of the nature referred to in S. 121. The real purpose of the rule is not with a view to the perfection of contracts or the passing of property, but for estimating promptly the damages resulting from the purchaser's failure to pay for the shares bought and accepted.

Appeal from a decree (15th March, 1923) of the High Court, Appellate Jurisdiction (Macleod, C. J. and Crump, J.), reversing a decree (17th August, 1922) of the same Court in its Original Jurisdiction (Kajiji, J.).

The facts and arguments appear from the judgment of their Lordships.

Clauson, K. C., E. B. Raikes and *Johnson* for appellants.

Sir John Simon, K. C., Sir George Lowndes, K. C. and *B. Dube* for respondents.

1st March, 1926. The Judgment of the Board was delivered by

Viscount Dunedin.

VISCOUNT DUNEDIN :—In March, 1920, the second plaintiff in this case, Arajania, who is not a certified share-broker, and who describes himself as the sub-broker of the first plaintiff Bharucha, who is a certified share-broker, sold on the Bombay Stock Exchange to first defendant, Gora, 129 shares of a Company called Alcock, Ashdown & Co., Ltd., for delivery on the 14th April, 1920. Neither of the two plaintiffs was the registered holder of any such shares. In order to make good the delivery the first plaintiff acquired the requisite number of shares in the market from various brokers, and took from these brokers blank transfers signed by the registered holders along with the corresponding certificates. These certificates and blank transfers were handed by the second plaintiff to the first defendant at 6 P. M. on the 14th April. At 8 P. M. a cheque for the sum due under the contract in favour of the first plaintiff was handed to the second plaintiff. This cheque was dishonoured on the next day.

The first defendant, having had the blank transfers and certificates thus delivered to him, made certain propositions as to the raising of money to Manilal, a partner in the firm of Wadilal & Co., the second defendants, and handed the certificates and transfers to him. The second defendant in turn handed them to the third defendant, Ghia, again on certain propositions as to raising money.

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The cheque was never honoured, and the first defendant absconded. The present action is brought by the first and second plaintiffs against all the three defendants, asking for return of the certificates and blank transfers or otherwise for damages.

Proof was led before the Trial Judge who held in fact (1) that plaintiff No. 2 acted as sub-broker to plaintiff No. 1, and that, accordingly, plaintiff No. 1 had a direct title to sue the other defendants; (2) that Manilal, the defendant No. 2, knew when he took the certificates and shares that the cheque of Gora, defendant No. 1, was not likely to be honoured. He gave a decree in favour of plaintiff No. 1 against all defendants. The ratio of his judgment is to be found in the following passage :—

"Gora was only an ostensible owner and the plaintiffs, who were the unpaid vendors, had equity in them, and they could have stopped Gora from getting these shares transferred in his name in the books of the company, but if Gora had passed on these shares either by way of sale or by way of pledge to any third person who acted *bona fide* and without notice. then I certainly think that such a person would have a better title to these shares than the plaintiffs. But in this case it is abundantly clear that Gora himself felt that he was not the owner. . . . . Manilal had notice that these shares were not paid for, and Ghia, being a mere nominee of Manilal, Ghia was in no better position than Manilal himself. They took these shares with the infirmity from Gora, and therefore they cannot claim these shares in priority to the plaintiffs."

He had previously pointed out that in a question with the Company the owners of the shares were the old owners who had signed the blank transfers.

On appeal by the second and third defendants the learned Judges of the Appellate Division of the High Court reversed the judgment of the Trial Judge and dismissed the action as against them. They held on the facts that plaintiff No. 2 had acted as agent for plaintiff No. 1, and that consequently, as plaintiff No. 2 was not a certified broker, the buyer was not affected by the rules of the Stock Exchange. This is only of importance as regards a certain Rule C, with which their Lordships will afterwards deal. On the merits of the case they held that, under the Indian Contract Act, the property of the shares as sold passed on the delivery of the certificates and blank transfers to Gora; that, after that, plaintiff No. 1 had no claim against Gora except upon the cheque; that consequently he had no claim against defendants Nos. 2 and 3, and could not have a judgment against defendant No. 3 for delivery

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of the certificates and transfers. They held further that S. 121 of the Contract Act, which is in these terms—

"121. When goods sold have been delivered to the buyer, the seller is not entitled to rescind the contract on the buyer's failing to pay the price at the time fixed unless it was stipulated by the contract that he should be so entitled,"

prevented the plaintiff from rescinding the sale, there having been no stipulation provided in the contract for sale that he should be so entitled. Appeal was then taken by the plaintiffs to the King in Council.

Their Lordships agree that the stipulation referred to in the section must be an express stipulation and that, as nothing was proved to the contrary, it must be presumed that the contract here was an ordinary contract for the sale of shares effected by bought and sold notes.

On the hearing of the appeal to their Lordships, the view expressed by the Trial Judge that Gora was only an ostensible owner of the shares and the plaintiff, who was the unpaid vendor, had the equity in them, was elaborated into an argument that, according to the law of England, there would be an equitable lien in favour of the unpaid purchaser and that that law applied. Such a view would be so far-reaching in ordinary Stock Exchange transactions that their Lordships think it necessary to emphasise their view of its unsoundness. In the first place, so far as lien is concerned, the law as to lien is statutory and is contained in the 95th and following sections of the Indian Contract Act. Section 95 applies to this case; unless there is possession there is no lien. But, further, there seems to their Lordships a good deal of confusion arising from the prominence given to the fact that the full property in shares in a Company is only in the registered holder. That is quite true. It is true that what Bharucha had was not the perfected right of property, which he would have had if he had been the registered holder of the shares which he was selling. The Company is entitled to deal with the shareholder who is on the register, and only a person who is on the register is in the full sense of the word owner of the share. But the title to get on the register consists in the possession of a certificate, together with a transfer signed by the registered holder. This is what Bharucha had. He had the certificates and blank transfers, signed by the registered holders. It would be an upset of all Stock Exchange transactions if it were suggested that a broker who sold shares by general description did not implement his bargain by supplying the buyer with certificates and blank transfers, signed by the registered holders of the shares described. Bharucha sold what he had

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got. He could sell no more. He sold what in England would have been choses in action, and he delivered choses in action. But in India, by the terms of the Contract Act, these choses in action are goods. By the definition of goods as every kind of moveable property it is clear that, not only registered shares, but also this class of choses in action are goods. Hence equitable considerations not applicable to goods do not apply to shares in India.

Now S. 78 is as follows :—

"78. Sale is effected by offer and acceptance of ascertained goods for a price, * * *
or of a price for ascertained goods, * * *
together with payment of the price or delivery of the goods."

Here the goods were not ascertained goods at the time of the contract, for the contract was only for so many shares of Alcocks', not of any particular shares, but then S. 83 provides :—

"83. Where the goods are not ascertained at the time of making the agreement for sale, but goods answering the description in the agreement are subsequently appropriated by one party for the purpose of the agreement, and that appropriation is assented to by the other, the goods have been ascertained, and the sale is complete."

So soon, therefore, as Arajania, acting for Bharucha, handed Gora the certificates and transfers and Gora accepted them and gave the cheque, the goods became ascertained goods, the sale was complete and the property passed. From that time onward Bharucha and Arajania could only sue Gora on the cheque, or for the price of the shares unpaid in respect that the cheque had not been honoured. They had no longer any *jus in re* of the certificates and transfers. They had no statutory lien, for they had parted with possession, and, consequently, as they had no contract with defendants Nos. 2 and 3, they could not sue them for delivery of the shares, whether the defendants had got good title as against Gora or had not.

Their Lordships have already mentioned that the Trial Judge held that the sale was between brokers, and was, therefore, under the rules of the Stock Exchange, from which finding the Court of Appeal dissented. In their Lordships' view it is not necessary to decide this question of fact. They will assume, for the purpose of the argument, that the sale was as between brokers. That brings in Rule C of the Bombay Stock Exchange, which is as follows :—

" C. If the cheque given for the monies of the shares will not be honoured at the bank on the day following the day when the cheque is given, the shares

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shall have to be returned immediately to the person selling (them), and the person purchasing (them) shall have to take away those shares having paid the rupees in cash before two o'clock on that very day. And if the person purchasing shall fail to do so, those shares will be sold off by auction before three o'clock.

* * * * * *

It was argued that the effect of this rule was to make the delivery not actual but conditional, with the result that the property did not really pass till the cheque was honoured. Their Lordships consider this argument quite unsound. The Contract Act settles that property is to pass on delivery. Delivery is a fact, and the statutory result must follow. Further, the rule cannot be read as an express stipulation in the sense of S. 121 because it does not say what S. 121 provides must be said. But in truth, in their Lordships' view, the rule in question had nothing to do with the perfection of contracts or the passing of property. It is for quite another purpose. The buyer may be unable, from temporary embarrassment, to meet his cheque on an exact day. Time is of the essence of this ordinary contract of sale of shares, therefore he is enjoined by the rule to hand back the shares; he is given the latitude of paying up till 2 o'clock, but if he does not do so then they are sold by the authorities, so as to fix, without further ado, the damages which are become due for breach of contract.

Their Lordships will accordingly humbly advise His Majesty to dismiss the appeal with costs.

Solicitors for appellants : *T. L. Wilson and Co.*

Solicitors for respondent No. 1 : *Hore, Pattisson* and *Bathurst.*

A. de M. *Appeal dismissed.*

PRIVY COUNCIL.

[On Appeal from the High Court of Judicature at Fort William, Bengal.]

PRESENT :—THE LORD CHANCELLOR, LORD PARMOOR, LORD BLANESBURGH, SIR JOHN EDGE AND MR. AMEER ALI.

P. C.

Pursuttamdas Agarwalla v. Gobind P. Agarwalla.

Pursuttamdas Agarwalla ... *Appellant**

v.

Gobind P. Agarwalla and others ... *Respondents.*

Hindu Will—Gift of income—Failure of portion of such gift—Residue for charitable purposes.

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*P C Appeal No. 135 of 1924. 12th March, 1926.

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Purusttamdas Agarwalla v. Gobind P. Agarwalla.

A testator by his will directed his trustees *inter alia* (clause 17) to pay out of the income of his estate the sum of Rs. 650 to the managers of a *mundir*, of which Rs. 100 were to be given as a gift to certain persons in succession, and the rest applied for the performance of *puja* and the feeding of the poor; and the (clause 23) "after paying the monthly sums and the monthly expenses hereinbefore directed to be paid or incurred, and also after providing for the payment of taxes, Government revenue and assessments and repairs of his immoveable property, the surplus of the rents, income and profits of his property and estate shall be monthly and every month remitted to the managers of the said *mundir* and applied in manner respecting the said monthly sum of Rs. 650, or so much thereof as is not required for the support of his family there, towards the performance of *pujas* and other religious ceremonies, and for the daily feeding of the poor at his *mundir*."

The beneficiaries of the sum of Rs. 100 bequeathed by cl. 17 had all died, and the trusts thereof for the benefit of other persons not named therein had become inoperative by reason of such persons not having been born in the testator's lifetime. In a suit instituted by the testator's grandson for the construction of the will, *held*, that the Rs. 100 per month fell into the general residue. and that the true effect of cl. 23, a general residuary clause, sweeping up all that was not disposed of by the preceding clauses, was that the residue should be applied for the religious and charitable purposes referred to in cl. 17, being the purposes applicable under that clause applied to the residue of the Rs. 650 per month after deducting the Rs. 100 per month; there was accordingly, no sum undisposed of by the will.

Appeal from a decree dated the 26th November, 1923, of the High Court, Appellate Jurisdiction (Sir L. Saunderson, C. J. and Richardson, J.) reversing a decree of the same Court (Pearson, J.) dated the 15th December, 1922.

The action was brought on the 1st August, 1919 by the testator's grandson against the other members of the testator's family and the trustees of his estate. The testator, Babulal Agarwalla, died on the 31st October, 1873, having previously on the 6th August, 1873 made the will in question, the material clauses of which are set out in their Lordships' judgment. Pearson, J., the Trial Judge, had decided in favour of the plaintiff (appellant), holding that, as regards the Rs. 100 under cl. 17 they fell under an intestacy, and that, as regards cl. 23, the proportionate amount of the surplus would follow the directions as to the Rs. 100 under cl. 17. On appeal, the Chief Justice and Richardson, J. reversed this decree, holding that, although by cl. 17 the testator intended to make a perpetual provision for the members of his family, such provision was bad in law, and by reason of its failure the Rs. 100 a month fell into the residue or surplus disposed of by cl. 23, and that, on the true construction of cl. 23, such residue was to be applied to the charities specified. The plaintiff appealed to His Majesty in Council.

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Purusttamdas Agarwalla v. Gobind P. Agarwalla.

The Lord Chancellor.

Sir G. Lowndes, K. C. and *G. D. McNair* for appellant.

L. de Gruyther, K. C. and *E. B. Raikes* for respondents.

12th March, 1926. The Judgment of the Board was delivered by

THE LORD CHANCELLOR:—This appeal raises a question as to the construction of the will of Babulal Agarwalla, who died in the year 1873. The will is in the English language and states (among other things) the testator's intention to erect a mundir and suitable buildings for the residence of members of his family and for the reception of poor and homeless persons at Sri Brindaban. Then by a clause, which has been referred to as clause 17, he directs that out of the income of his estate "a sum of Rs. 650 (subject to the increase hereinafter mentioned) be remitted monthly and every month by my executors or trustees to the managers for the time being of the mundir of Brindaban to be erected as aforesaid, out of which sum Rs. 100 shall be paid to" certain persons in succession; and then the clause continues, "and the residue or surplus shall be appropriated towards the expenses of performing pujas at or otherwise maintaining the said mundir and of the daily feeding of the poor there." The beneficiaries of the monthly sum of Rs. 100 named in this clause are all dead, and it is common ground that the trusts declared of that monthly sum for the benefit of other persons not there named is inoperative, those persons not having been born in the testator's lifetime. Then by cl. 23 of the will the testator says this:—

> "I further direct that after paying the monthly sums and the monthly expenses hereinbefore directed to be paid or incurred and also after providing for the payment of taxes, Government revenue and assessments and repairs of my immoveable property, the surplus of the rents, income and profits of my property and estate shall be monthly and every month remitted to Brindaban and applied in manner respecting the said monthly sum of Rs. 650, or so much thereof as is not required for the support of my family there, towards the performance of pujas and other religious ceremonies, and for the daily feeding of the poor at my mundir there."

Upon those clauses three points arise. The first question is whether, the trusts of the sum of Rs. 100 per month having failed, that sum falls into the residue of the Rs. 650 a month and is applicable according to the trusts of cl. 17. It is not necessary to decide that question, as it has been assumed throughout, and their Lordships will assume in favour of the appellant, that the Rs. 100 a month does not fall into that particular residue of which the trusts are declared by cl. 17.

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The Lord Chancellor.

The second question is whether, assuming that to be so, the Rs. 100 a month falls into the general residue which is disposed of by cl. 23. In their Lordships' opinion it does. Cl. 23 is a general residuary clause, sweeping up all that is not disposed of by the previous clauses; and, accordingly, by virtue of the ordinary rule, the monthly sum of Rs. 100, assuming it not to be disposed of by cl. 17, falls into the residue of which trusts are declared by clause 23.

Then a third question is raised. Cl. 23 directs the surplus to be "applied in manner respecting the said monthly sum of Rs. 650, or so much thereof as is not required for the support of my family there towards the performance of pujas and other religious ceremonies, and for the daily feeding of the poor at my mundir there." It is suggested on behalf of the appellant, and the learned Judge who first dealt with the matter was disposed to hold, that the effect of that trust was that a proportion of the residue, bearing the same proportion to the whole as the Rs. 100 bore to the total sum of Rs. 650, became applicable for the support of the testator's family, described in cl. 17, and that particular trust having failed, is undisposed of and passes to the testator's heirs. In their Lordships' opinion that is not the true effect of the clause. The clause in substance directs that the residue shall be applied for the religious and charitable purposes referred to in cl. 17, being the purposes applicable under that clause applied to the residue of the Rs. 650 per month after deducting the Rs. 100 per month, and this view is supported by the words "subject to the increase hereinafter mentioned," contained in cl. 17. The result is that, in their Lordships' opinion, there is no sum not disposed of by the will, and, accordingly, that the judgment of the High Court at Calcutta is right and should be affirmed. Their Lordships will therefore humbly advise His Majesty that the appeal fails and should be dismissed with costs.

Solicitors for appellant : *Morgan, Price, Gordon* and *Marley.*

Solicitors for respondents : *Watkins* and *Hunter.*

A. de M. *Appeal dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—MR. JUSTICE DEVADOSS AND MR. JUSTICE WALLER.

Radhakrishna Aiyar ... *Appellant** (*Petitioner*)

v.

B. Srinivasa Aiyar and others ... *Respondents* (*Respondents 1 to 4*).

Radhakrishna Aiyar *v.* Srinivasa Aiyar.

Civil Procedure Code, S. 146—Interpretation—Vendor—Appeal filed by—Vendee's right to continue—Vendee interested only in portion of subject-matter of suit—Effect.

Held, that the appellant, who claimed an interest in a portion of the subject-matter of the suit, was entitled to continue an appeal which had been filed by his vendor.

The proper interpretation of S. 146 of Civil Procedure Code is a person who is entitled to make an application or file an appeal which could have been made or filed by another under whom he claims but which has not been made or filed is also entitled to continue the application or appeal which has been made or filed by such person when that application or appeal is not properly prosecuted or when such person dies before the application or appeal is disposed of.

Appeal under cl. 15 of the Letters Patent against the order dated 18th September, 1924 of the Hon'ble Mr. Justice Jackson in S. R. No. 24570 of 1923 on the file of the High Court (Petition) praying to bring on record the appellant (Radhakrishna Aiyar) as 2nd petitioner in S. R. No. 12691—petition to be permitted to prefer in *forma pauperis* the Second Appeal sought to be preferred to the High Court against the decree of the District Court of Chingleput in A. S. No. 166 of 1921 and in C. M. P. No. 2199 of 1923, a petition praying to excuse the delay in presenting the said S. R. No. 12691 of 1923.

N. Chandrasekhara Aiyar for appellant.

M. S. Venkatrama Aiyar for respondents.

The judgment of the Court was delivered by

Devadoss, J.

DEVADOSS, J.:—The only point in this Letters Patent appeal is whether a person who is claiming an interest in a portion of the subject-matter of the suit is entitled to continue an appeal filed by his vendor. In this case the appellant's vendor filed an application for leave to appeal in *forma pauperis* on 10th July, 1923 with a memorandum of appeal. He died on 24th September, 1923 and on 5th December, 1923 the appellant made an application to be made a party appellant for the purpose of prosecuting the second appeal. The

*L. P. A. No. 99 of 1924. 20th November, 1925.

Radhakrishna Aiyar v Srinivasa Aiyar.

Devadoss, J

application to appeal in *forma pauperis* was dismissed and the appellant was directed to pay the Court-fee, and a month's time was granted him for the purpose. He has paid the Court-fee. His application for stay of proceedings in C. M. P. No, 2221 of 1923 was dismissed by Mr. Justice Jackson on the ground that the appellant had no right to continue the appeal which was filed by his vendor. The learned Judge distinguished the case of *Muthiah Chettiar* v. *Govinddoss Krishnadoss* (1) from this case on the ground that the appellant wanted to continue the appeal already filed by his vendor and not that he wanted to file another appeal. S. 146, Civil Procedure Code, says: "Where any proceeding may be taken or application made by or against any person, then the proceeding may be taken or the application may be made by or against any person claiming under him."

Mr. M. S. Venkatrama Aiyar for the respondents contends that S. 146 applies to the filing of a fresh suit or a fresh appeal and not for continuing a suit or appeal pending. We are unable to accept this contention. If the appellant is entitled to present another appeal to this Court against the decree passed against his vendor we fail to see why he should not be allowed to continue the appeal which was filed by his vendor. The proper interpretation of S. 146 is a person who is entitled to make an application or file an appeal which could have been made or filed by another under whom he claims but which has not been made or filed is also entitled to continue the application or appeal which has been made or filed by such person when that application or appeal is not properly prosecuted or when such person dies before the application or appeal is disposed of.

In this connection we may refer to the decision in *Seshadri Reddi* v. *Venkata Reddy* (2). We therefore hold that the appellant is entitled to prosecute the appeal filed by his vendor and we set aside the order of the learned Judge, and direct that the appellant be brought on record in the second appeal.

The costs of this appeal will be costs in the second appeal.

A. S. V. *Appeal allowed.*

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(1) (1921) I L R 44 M 919 : 41 M L J 316 (F B.).
2. (1923) 19 L W 660.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—MR. JUSTICE ODGERS AND MR. JUSTICE MADHAVAN NAIR.

Appadurai Mudali and another ... *Appellants** (*Plff. and nil*)

v.

Murugappa Mudali and two others ... *Respondents* (1 *to* 3 *Defendants*).

Appadurai Mudali v. Murugappa Mudali.

Second Appeal—New plea in—Permissibility—Plea not allowed by Lower Appellate Court—Abkari Act—Abkari business—Partnership as regards—Legality—License not in names of all partners—Effect—Partnership illegal—Money lent to—Recovery of—Lender's right to—Knowledge at time of lending that partnership was illegal—Proof of—Onus—Effect.

In a suit on a promissory note, the defendants in the Lower Appellate Court for the first time raised the plea that the plaintiff was not entitled to recover because the amount of the suit note was borrowed for the purpose of a partnership which was illegal and opposed to public policy and the plaintiff knew of the illegal nature of the business when he advanced the money on the note. The Lower Appellate Court refused to allow the plea to be raised, and affirmed the decision of the Court below in favour of the plaintiff.

In Second Appeal the plea was, however, allowed to be raised, and the appeal remanded for trial after raising a fresh issue as to whether the plaintiff was entitled to recover the suit amount as it was lent to a partnership which was illegal.

Held, in Letters Patent Appeal, that the plea ought not to have been allowed to be raised.

Where it was alleged that a partnership between defendants 1 to 3 in the matter of an Abkari business was illegal and opposed to public policy, because the Abkari license stood only in the names of the defendants 2 and 3 instead of all the three partners, but the license itself was not produced, *held,* that, in the absence of evidence to show that it was a condition of the license that all the names of the licensees or persons concerned in that particular business by way of partnership, etc., must appear on the face of the license, the partnership could not be held to be illegal.

Prima facie there is nothing illegal in such a partnership under the Abkari Act.

A person lending money for the purpose of a business which is found to be illegal is not disentitled to recover unless he knew at the time he lent the money that the business was illegal; and the onus of showing that he did is on the party who sets up that plea.

Appeal under cl. 15 of the Letters Patent against the Order of the Hon'ble Mr. Justice Devadoss dated 1st September, 1924 in Second Appeal No. 390 of 1922 preferred to the High Court against the decree of the Court of the Subordinate Judge of Vellore in A. S. No. 89 of 1921 (A. S.

* L. P. A. No. 135 of 1924. 28th September, 1925.

No. 212 of 1920, District Court, North Arcot) preferred against the decree of the Court of the District Munsif of Tirupattur in O. S. No. 102 of 1919.

Appadurai Mudali v. Murugappa Mudali.

A. Krishnaswami Aiyar for appellants.

V. C. Seshachariar for respondents.

The Court delivered the following

JUDGMENTS :—*Odgers, J.* :—This is an appeal from the judgment of Mr. Justice Devadoss whereby he remanded an appeal for trial after raising a fresh issue as to whether the plaintiff is entitled to recover the suit amount as it was lent to a partnership which was illegal. The plaint sets up the promissory note sued on. The defendants 1 and 3 say that they (defendants 1 to 3) took the contract of sale of arrack in certain shops in Vaniyambadi for the year 1916-17. They borrowed the money for the purpose of that business and they plead a discharge by payment, *i. e.*, that under certain arrangements made between themselves and the plaintiff, the latter had a surplus sufficient to cover the amount of the promissory note in his hands. The 2nd defendant pleaded that the arrangement was that the plaintiff should appropriate to discharge the pro-note the sale proceeds which he received on behalf of the defendants for the last 80 days of the year 1916-17. Two issues were framed, namely (1) as to whether there was a discharge as pleaded by defendants 1 and 3, *i. e.*, by their deposit of the daily sale proceeds of the toddy with the plaintiff, and (2) was the 2nd defendant discharged by reason of the plea raised by him that the plaintiff should pay himself up the sale proceeds of the last 80 days of the Abkari year?

Odgers, J.

The District Munsif found the first issue in favour of the plaintiff and held that there was no evidence on the second issue. He therefore decreed the suit in favour of the plaintiff. In the grounds of appeal to the Lower Appellate Court the defendants for the first time set up that their partnership was illegal and opposed to public policy and that the plaintiff having admitted in his evidence that the Abkari license stood only in the names of the defendants 2 and 3 instead of all the three partners must fail as he knew of the illegal nature of the business when he advanced the money on the promissory note. That is a plea set up for the first time in the Lower Appellate Court, and based on the so-called admissions of the plaintiff in his evidence in which he said that the money

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Odgers, J

was borrowed for the purpose of the Abkari business and at the time it was borrowed he, the plaintiff, knew that their object was to carry on this business. The learned Judge of this Court, from whose judgment this Letters Patent Appeal is taken, on that alleged admission, holds that the business was illegal and that the plaintiff was, according to the decisions, *particeps criminis* in this illegal business that was being carried on. In my opinion the business was not illegal at all. It was no doubt controlled by the conditions not only set out in S. 24 of the Abkari Act to which we have been referred, but also by something in the Abkari rules to which we have not been referred or in the conditions to the grant of the license itself. The license is not before us. But even supposing that the condition of the license is that all the names of the licensees or persons concerned in that particular business by way of partnership, etc., must appear on the face of the license, it is a question whether on the evidence of the plaintiff he can be said to be *particeps criminis* in the carrying on of the illegal trade. As the Court of Queen's Bench said in *Waugh* v. *Morris* (1), a contract lawful in itself, is illegal when it is entered into with the object that the law should be violated, if it is done for the very object of satisfying any illegal purpose, or, for the express purpose of a violation of the law. It is admitted by the learned Vakil for the respondents before us that the onus is on him to show that the plaintiff was *particeps criminis* in this matter. In *Brahmayya* v. *Ramiah* (2) the license to sell arrack contained a restriction. In the course of the judgment in a suit to recover a loan advanced to the partnership, the learned Judges say that the partnership is illegal by reason of the fact that the licensee took a partner without first obtaining permission. There, on the facts, they also held that the plaintiff had notice of the illegality of the partnership. The learned Judges there adopted a passage from Lindley on Partnership, 8th Edition, page 127 which runs:—

"The illegality of a partnership affords no reason why it should not be sued. It cannot indeed be effectually sued by any person who, being aware of all the facts, seeks to enforce a demand arising out of a transaction tainted with the illegality which affects the firm; but the illegality of the firm does not *per se* afford any answer to a demand against it arising out of a transaction to which it is a party and which transaction is legal in itself. Unless the person dealing with the firm is *particeps criminis,* there can be no *turpis causa* to bring

1. (1873) L R 8 Q B 202. 2. (1919) I L R 43 M 141 : 38 M L J 123.

him within the operation of the rule *ex turpi causa non oritur actio* and he not being implicated in any illegal act himself cannot be prejudiced by the fact that the persons with whom he has been dealing are illegally associated in partnership"

and they conclude by saying:—

"Where there is nothing illegal or opposed to public policy in the business itself and there is nothing which touches the conscience of the lender the decisions as to illegal transactions have no application."

As to the matter under consideration by the learned Judges in *Brahmayya* v. *Ramiah* (2) they held:

"It was a perfectly legal business by which the inclusion of the 2nd defendant became inoperative as a partnership."

The plaintiff was held entitled to recover part of the amount he sued for. I am therefore constrained to differ from the conclusion arrived at by the learned Judge in both respects, namely, that I do not think the issue should have been framed at all, nor do I think that the plaintiff can be said to have had a guilty knowledge such as would bring him within the purview of the cases so as to make him *particeps criminis* in the transaction and that his so-called admissions do not establish this against him. Assuming that there is a prohibition in the terms of the license there is no evidence that the plaintiff ever knew of it. It seems to me that the learned Judge was wrong in raising this issue in second appeal which had never been raised by the parties in the first Court and which the Lower Appellate Court had refused to raise on appeal. I therefore think that we must allow the appeal and set aside the order of remand and restore the decree of the Subordinate Judge with costs in the Letters Patent Appeal and Second Appeal.

Madhavan Nair, J.

Madhavan Nair, J. :—I entirely agree. In the absence of the license, it is impossible to say that the partnership between the defendants in this case was illegal. *Prima facie* there is nothing illegal in such a partnership under the Abkari Act, and no rule issued under the Act has been brought to our notice to show that the arrangement is illegal. The decision in *Brahmayya* v. *Ramiah* (2) as regards the legal nature of the partnership in that case depended on the terms of the license issued to the parties.

The learned Judge quotes a passage from the evidence of the plaintiff to show that he knew that he was lending money

2. (1919) I L R 43 M 141 : 38 M L J 123.

Appadurai Mudali v. Murugappa Mudali.

Madhavan Nair, J.

to a contract which was illegal. With all deference I think that inference does not necessarily follow from the evidence unless in the first instance it is proved that the contract itself is illegal. As I have said, I am not satisfied that, that has been done in this case. I do not think that the plaintiff can be said to have known about the illegality of the contract when he lent the money. In this view, the principle applicable to this case is what is contained in the passage quoted by my learned brother from Lindley on Partnership, 8th Edition, page 127.

I also think that the learned Judge, with due deference, was wrong in having allowed the parties to raise an issue which was not raised or argued before the District Munsif. The learned Subordinate Judge refused to allow arguments to be addressed on the new issue.

Under these circumstances, I agree with my learned brother that this Letters Patent Appeal should be allowed and the Subordinate Judge's decree should be restored with costs throughout.

A. S. V. *Appeal allowed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—MR. JUSTICE SPENCER AND MR. JUSTICE VENKATASUBBA RAO.

Kesar Singh ... *Appellant** (*2nd defendant*)

v.

The Secretary of State for India in Council represented by the Collector of Kurnool ... *Respondent* (*Plaintiff*).

Kesar Singh v. The Secretary of State for India.

Hindu Law—Widow—Adoption with assent of sapindas—Cognate—Assent of, if and when enough—Assent of sapinda—Taking part in adoption if and when amounts to—Inheritance—Bandhu—Heritable bandhu—Father's sister's son's daughter's son of propositus if a—Tests of heritability among bandhus—"Line theory" of Professor Sarvadhikari—Discussion of.

Held, that a widow, who had not been authorised by her husband to adopt a son, could, in a case in which there was no agnate relation, validly adopt a son with the assent of the nearest cognate relation who under the law would be the presumptive reversioner.

Per Spencer, J.:—No doubt, agnates should, as a rule, be consulted first, if there are agnates, because the principal agnates are the nearest kinsmen, but there is no authority for limiting the class of gnatis and sapindas, whose assent may be taken by a widow about to adopt a son, to agnates.

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*Appeal No. 334 of 1922. 6th January, 1926.

Kesar Singh v. The Secretary of State for India.

Neither the word "gnati" nor the word "sapinda" is synonymous with the English word "agnate".

Per Venkatasubba Rao, J..—From the mere fact that a sapinda takes part in an adoption by a widow, it cannot be inferred either that he gives his consent to it or that there is on his part such exercise of discretion as will render the consent effectual.

Held, that a person who was the father's sister's son's daughter's son of the propositus and of whom the propositus was the mother's father's mother's brother's son was a heritable bandhu of the propositus.

Per Spencer, J.:—The text of the writings of the ancient expounders of Hindu Law does not warrant the restriction of heritable cognates to those in the father's agnate line and the mother's agnate line.

Per Spencer and Venkatasubba Rao, JJ..—There are two known tests of capacity for inheriting among bandhus which must be satisfied, and these are (1) sapinda relationship ceases in the case of bhinnagotra sapindas or bandhus after the 5th degree from the common ancestor when the descent is through a female and after the 7th degree from the common ancestor when the descent is through a male; (2) there must be an element of mutuality between the claimant and the propositus; in other words, they must be so related that they are sapindas of each other.

Appeal against the decree of the Court of the Subordinate Judge of Kurnool, dated 23rd December, 1921, in O. S. No. 11 of 1920 (O. S. No. 5 of 1917 on the file of the District Court, Kurnool).

A. Krishnaswami Aiyar and *W. Kothandaramayya* for appellant.

The Government Pleader for respondent.

The Court delivered the following

Spencer, J.

JUDGMENTS:—*Spencer, J.*:—I have had the advantage of seeing the judgment which my learned brother is about to deliver. On the questions of fact I have nothing to add to what he will state beyond expressing my entire agreement with his conclusions. On the two questions of law arising out of the 5th and 6th points I wish to express my concurrence with his opinion. His opinion on the 5th point agrees also with that of Ramesam, J., in *Anne Brahmayya* v. *Chelasami Rattayya* (1). I agree with them in respectfully dissenting from the view expressed by Oldfield, J., in *Viswasundara Rao* v. *Somasundara Rao* (2) to the effect that the class of sapindas, whose consent should be obtained by a widow in order to supply the authority lacking in consequence of her husband having died without authorising her to adopt a son, is limited to agnates. In the judgment of Seshagiri Aiyar, J., in *Kristnayya* v. *Lakshmipathi* (3) the Smrithi of Yajnavalkya,

1. (1924) 20 L W 503.
2. (1920) I L R 43 M 876.
3. (1920) I L R 43 M 650 30 M L J 265 (P C).

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which is the basis for the theory that a woman, who has no husband, father or sons, needs the advice of those who are her natural protectors, is quoted:—

रक्षेत् कन्यां पिता विन्नां पतिः पुत्रस्तु वार्धके अभावे ज्ञातस्तेषां न स्वातन्त्र्यं क्वचित् स्त्रियाः ।

Let her father protect a maiden, her lord a married woman, sons in old age; if none of these, other gnatis; she is not fit for independence.

Here the word used is " gnatis".

But temporal considerations cannot be left out of account. Proximity to the deceased with respect to rights of property is also an important factor in considering who should be consulted, for the reason that those persons who would succeed to the property, if no adoption were made, are most interested in the protection of the inheritance and in restraining the widow concerned from acting capriciously (vide *Sri Raghunadha* v. *Sri Brozo Kishoro* (4) and *Veera Basavaraju* v. *Balasurya Prasada Rao* (5). As regards the devolution of property the original text of Manu is :—

अनन्तरः सपिण्डाद्यस्तस्य तस्य धनं भवेत् ।

(Manu IX. 187) which may be translated literally:—

Whoever is unremote from the sapinda to him let his wealth belong.

The word used here is " sapinda".

Now neither the word 'gnati' nor the word 'sapinda' is synonymous with the English word " agnate", whatever may be the suggestion conveyed by the common root " gna". For sapindas undoubtedly include bhinnagotra sapindas who are cognates, and in Professor Monier William's Dictionary "gnati" is defined as a " paternal relation, a kinsman in general, a father, a brother, a distant kinsman, one who does not participate in the oblations offered to deceased ancestors (according to the School, gnatis is a paternal and sambhandh in maternal relation; the original meaning of gnati may be 'intimately acquainted'). *Cf.* Greek (Gustoo Gnotee).

I am satisfied that in the passage where Mr. Ameer Ali observed in *Veera Basavaraju* v. *Balasurya Prasada Rao* (5) " The Ramnad case established the proposition that in the Dravida country under the Dravidian branch of the Mitak-

4. (1876) L R 3 I A 154 : I L R 1 M 69 (P C)

5. (1918) L R 45 I A 265 : I L R 41 M 998 (1004) : 36 M L J 40 (42) (P C).

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shara Law—there is force—in the absence of authority from her deceased husband, a widow may adopt a son with the assent of his male agnates", and in the other passage in *Kristnayya* v. *Lakshmipathi* (3) where Viscount Cave observed at p. 654: "The consent required is that of a substantial majority of those agnates nearest in relationship who are capable of forming an intelligent and honest judgment on the matter", their Lordships had no intention of laying down the propositions (1) that in the absence of agnates available for being consulted no adoption could be made by a widow who had failed to obtain the authority of her husband, and (2) that in no circumstances should cognates be consulted. No doubt agnates should as a rule be consulted first, if there are agnates, because the principal agnates are the nearest kinsmen but there appears to be no authority for limiting the class of gnatis and sapindas, whose assent may be taken by a widow about to adopt a son, to agnates, except the judgments of my learned brothers Oldfield and Phillips, JJ., in *Viswasundara Rao* v. *Somasundara Rao* (2) and of Jackson, J. in *Anne Brahmayya* v. *Chelasami Rattayya* (1) and I unable to regard the reasons given by them for excluding a daughter's son as convincing and well founded.

Now leaving the 5th point and turning to the 6th point, I find from the pedigree that Kesar Singh is the father's sister's son's daughter's son of Ananta Ram Singh, the propositus, and that Ananta Ram Singh, the propositus, is the mother's father's mother's brother's son of the claimant Kesar Singh. In other words, Kesar Singh is towards Ananta Ram Singh in Class III of the matri bandhus Group VI (*d*) mother's pitri bandhus; and Ananta Ram Singh is as regards Kesar Singh in Class III of matri bandhus Group VI (*d*) mother's father's own bandhus in the tables of heritable bandhus accompanying the article by Mr. Ganapathi Aiyar at 9 M. L. J. 59 quoted by the Subordinate Judge in paragraph 44 of his judgment. They are also both within 5 degrees of the common ancestor Dhan Singh *alias* Kem Singh. In the genealogical table at p. 785 of Mayne's 7th Edition of Hindu Law the owner's paternal aunt's son's daughter's son is shown as a heritable bandhu and the authority for his right is quoted in the footnote as *Parot Bapa Lal Sevakram* v. *Mehta Harilal Surajram* (6); but the decision appears to decide the right of inheritance of a paternal aunt's daughter's son, not that of a

1. (1924) 20 L W 503. 2. (1920) I L R 43 M 876.
3. (1920) I L R 43 M 650 : 30 M L J 265 (P C). 6. (1894) I L R 19 B 631.

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paternal aunt's son's daughter's son. In the present case the claimant is one more degree removed from the propositus, and the two females who intervene in the line of descent have a male intervening between them instead of being successive.

Parot Bapa Lal Sevakram v. *Mehta Harilal Surajram* (6) purports to follow the Full Bench case of *Umaid Bahadur* v. *Udoi Chand* (7) which was also followed by a Bench of the same Court in *Babu Lal* v. *Nanku Ram* (8) and is quoted with approval in the Privy Council decision in *Ramchandra Martand Waiker* v. *Vinayak Venkatesh Kothekar* (9) but is stated by Sadasiva Aiyar, J., in *Chinna Pichu Aiyangar* v. *Padmanabha Aiyangar* (10) to contain a fallacious conclusion. The defendant in *Umaid Bahadur* v. *Udoi Chand* (7) was in the same degree of relationship to the propositus as E was to B in the table at p. 128. It was unnecessary for the purpose of that case to decide whether E's son F was a sapinda of B. The learned Judges observed that F was within six degrees from the common ancestor. He was actually 5th in descent from A; and the *Acharakanda* declares that sapinda relationship ceases only after the 5th ancestor on the mother's side in the mother's line and after the 7th ancestor on the father's side in the father's line, calculating from whence the direction of the line changes. So the statement as to B and F not being sapindas to each other was an *obiter dictum* and the reference to six degrees is not intelligible. The Sanskrit word for 'line' in verse 53 of the *Acharakanda* quoted in West and Buhler at pp. 174-175 (125-126 Cal.) is "*santana*" सन्तान which means " extending, spreading, lineage, race, family, progeny, offspring, a son or daughter". It does not appear to denote male ancestors and male descendants exclusively. In Golap Chandra Sarkar's Hindu Law, 5th Edition, p. 98, the learned author observes that each link is called a purusha " पुरुष " which means "a generation, a person, a man" but that is not the word used in this text. He also observes that recent commentators confine the upward lines to male ancestors only, although the downward lines according to them may pass through males or females, or either, and that no reason is assigned by them for this distinction. He comments on the fact that the Mitakshara does not say anything about the lines passing through males only,

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6. (1894) I L R 19 B 631 7. (1880) I L R 6 C 119 (F B).
8. (1894) I L R 22 C 339. 9. (1914) I L R 42 C 384 : 27 M L J 333 (P C).
10. (1920) I L R 44 M 121 : 39 M L J 417.

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or through both males and females without any distinction, and he thinks that the novel views which were propounded for the first time by the Tagore Law Lecturer of 1880 were embodied in the judgment of Full Bench in *Umaid Bahadur* v. *Udoi Chand* (7) and that they are peculiar to Professor Sarvadhikari and unsupported by authority.

The Tagore Law Lecturer for 1883, Dr. Jolly, criticised Professor Sarvadhikari's theory in these words at p. 216: "An essentially new system of bandhu relationship under Mitakshara Law has been recently proposed by Rajkumar Sarvadhikari. He takes the three bandhus each as indicative of the three principal classes of bandhus and not as embracing the nine bandhus specially named only. This theory has the advantage of giving a clue to the order of precedence among the bandhus. However though it is developed with rigorous logic from the date put forth by its author, there is no sufficient foundation for these data in the Mitakshara to commend its ready acceptance." Some general remarks on the subject of female succession follow.

Professor Sarvadhikari enunciates the proposition that in the case of bandhus on the paternal side there cannot be more than two females between the claimant and the propositus and that if there are two females, these two must be related as mother and daughter to each other. But the text of the writings of the ancient expounders of Hindu Law does not warrant the restriction of heritable cognates to those in the father's agnate line and the mother's agnate line. Supposing that is the correct interpretation to be placed on the passage from the *Acharakanda* to which I have referred above, the logical result would be to allow the intervention of no more than one female, and two females should not be allowed to intervene even though they may be related as mother and daughter.

Adit Narayan Singh v. *Mahabir Prasad Tiwari* (11) is a case in point. The suit of the purchasers of the estate of one Hanuman, who was a matri bandhu (mother's paternal aunt's son) of the propositus, failed in the Privy Council because of the existence of a mother's sister's grandson (an atma bandhu) named Rajendra.

It was not considered by the Judicial Committee to be an objection to Rajendra's title that two females intervened between Rajendra and the propositus Dhanukdari even though

7. (1880) I L R 6 C 119 (F B). 11. (1921) L R 48 I A 86 : 40 M L J 270 (P C).

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those two females were not related as mother and daughter but as sisters. In the case before us two females intervene between Kesar Singh and Ananta Ram Singh, viz., Ganga Bai and Ammir Bai, who are related to the claimant as mother and maternal great-grandmother respectively, and a male, viz., Jagannatha Singh, who is Kesar Singh's maternal grandfather, intervenes between them. In *Adit Narayan Singh* v. *Mahabir Prasad Tiwari* (11) the principle is once more recognised that the enumeration of bandhus as heirs in the Mitakshara is illustrative and not exhaustive. This is sufficiently evident from the fact that such obvious heirs as a sister's son and a maternal uncle are not specially mentioned although the maternal uncle's sons are among the cognate kindred enumerated in the text of Chap. II, S. 6, p. 11. This principle was established in *Muthuswami Mudaliar* v. *Sunambedu Muthukumaraswami Mudaliar* (12). In *Krishna Aiyangar* v. *Venkatarama Aiyangar* (13) quoted by the Judicial Committee in *Adit Narayan Singh* v. *Mahabir Prasad Tiwari* (11) the suggestion is thrown out that a party who is able to trace his descent with a lesser intervention of females than another might claim to be preferred, but it is not stated that two females are the limit, or that if there are two, they must come one after the other as mother and daughter. The question was left open whether a preponderating male element in the lines of ancestors should prevail and the case was decided by giving preference to an atma bandhu over a pitri bandhu on the principle that the nearer line excludes the more remote. The same suggestion occurs again in *Tirumalachariar* v. *Andal Ammal* (14).

I have mentioned that among modern writers Sarkar does not adopt the views enunciated by Professor Sarvadhikari. Ghose also considers that the mode of computation from the propositus up to the common ancestor and then down to the claimant advocated by Professor Sarvadhikari is opposed to all the Hindu Lawyers and to the express words of the Mitakshara and he says at p. 146 of his principles of Hindu Law (3rd Edition) that the rule laid down in *Umaid Bahadur* v. *Udoi Chand* (7) has not been followed in later cases in the same Court and in the High Courts of Madras, Allahabad and Patna and he cites several instances of bandhus

7. (1880) I L R 6 C 119 (F B).
11. (1921) L R 48 I A 86 : 40 M L J 270 (P C)
12. (1896) L R 23 I A 83 : 6 M L J 113 (P C).
13. (1905) I L R 29 M 115. 14. (1907) I L R 30 M 406 : 17 M L J 285.

whose claims as heirs have been recognised even though more than one female intervened in the line between them and the propositus including the case of *Babu Lal* v. *Nanku Ram* (8). On the other hand Mr. Banerjee appears to range himself on the side of Sarvadhikari (*see* p. 68, Banerjee's Hindu Law of Marriage and Stridhana where the learned author says that a line of female ancestors is not regarded as a line in Hindu Law). Ramesam, J., in *Rami Reddi* v. *Gangi Reddi* (15) notices that some of Professor Sarvadhikari's views on priority of succession based on separation into four families have not been accepted by the Judicial Committee.

It has been long settled that succession under the Mitakshara Law depends upon propinquity and not upon religious efficacy, which is one reason for not excluding cognates who trace their relationship through one or more females.

But there are two known tests of capacity for inheriting among bandhus which must be satisfied, and these are (1) sapinda relationship ceases, in the case of ***bhinnagotra*** sapindas or bandhus after the 5th degree from the common ancestor when the descent is through a female and after the 7th degree from the common ancestor when the descent is through a male, and (2) there must be an element of mutuality between the claimant and the propositus; in other words, they must be so related that they are sapindas of each other.

Both these tests have been referred to in the most instructive case of ***Ramchandra Martand Waiker*** v. ***Vinayak Venkatesh Kothekar*** (9). There the plaintiffs were Laxman Rao's paternal grandfather's son's son's daughter's daughter's sons. As they claimed through a female and as the common ancestor Timaji was more than 5 degrees removed from the plaintiffs, Timaji was not a sapinda of plaintiffs. It followed therefore that that Timaji's descendants among whom was the propositus Laxman Rao were not sapindas of plaintiffs and thus plaintiffs' claim failed, although the plaintiffs were sapindas of Laxman Rao, whose descent from the common ancestor Timaji was through males, as Laxman Rao could count seven degrees from the common ancestor in enumerating his sapindas. The principle is that when a man computes his relations (sapindas) through his

8. (1894) I L R 22 C 339.
9. (1914) I L R 42 C 384 (385): 27 M L J 333 (P C).
15. (1924) I L R 48 M 722 at 724.

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father he has a wider range (7 degrees) than when he computes his relations through his mother, and those relations of his who are connected with him through their mothers have a smaller range (5 degrees) and will only include him among their sapindas if he comes within that limit. Applying this test to the pedigree in the present case we find that Dhan Singh *alias* Kem Singh, the common ancestor, is within 5 degrees of Kesar Singh, who claims relationship to Anantaram Singh through his mother, and that Anantaram Singh who was related to Kesar Singh through his father, Mohan Singh, is easily within 7 degrees of the common ancestor Dhan Singh. The plaint pedigree unnecessarily shows Bagirath Singh, the father of Dhan Singh, but he need not be reckoned in the counting which starts from the common ancestor. For these reasons I agree with my learned brother that the appeal must be allowed with costs of the appellant here and in the Lower Court and the plaintiff's suit is dismissed.

In view of the special difficulty and importance of this case we allow a Vakil's fee of Rs. 2,500 in this Court.

Under O. 33, R. 10, Civil Procedure Code, the Court-fee payable on the appeal may be recovered from the pauper appellant, either by deducting the same from the costs awarded to him and paying him the balance, or otherwise from his properties.

Venkatasubba Rao, J.

Venkatasubba Rao, J.:—The Government claim the suit properties on the ground of escheat. They originally belonged to Kurnool Anantaram Singh who died about 1864 or 1865 and on his death his inheritance devolved on his widow Ramabai. Kesar Singh, who is referred to as the 2nd defendant, resists the suit of the Government on the ground *inter alia* that he was adopted by Ramabai in the year 1900 and that his adoption was recognised and acted upon till her death in September, 1915. The estate was also claimed by one Nuzwid Anantaram Singh who alleged that he was the heir entitled to the property after the widow's death. He also filed a suit and Kesar Singh was the principal defendant. There was thus a three-cornered contest, the claimants being the Government, Nuzwid Anantaram Singh and Kesar Singh. It is necessary to mention in this connection that in 1895 a suit O. S. No. 2 of 1875 was filed against Ramabai by certain persons who claimed to be the nearest reversioners of Anantaram Singh. Four plaintiffs instituted that suit, the object of

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which was, to have certain alienations made by Ramabai declared invalid. Lakshmana Singh, P. W. 1 and Umrao Singh, P. W. 2, are two out of the said four plaintiffs. That suit was dismissed as it was found that the claimants were not the reversioners. Nuzwid Anantaram Singh now put forward in the Lower Court the same pedigree as the plaintiffs in the suit of 1895 relied on and he claimed to be related to the last male owner in precisely the same manner as those plaintiffs claimed they were related. He availed himself of the fact that he was not made a party to the previous suit and sought to rely upon the pedigree which was held to be false in that litigation. The two suits, that of the Government and that of Nuzwid Anantaram Singh, were tried together by the Lower Court and the claim of Nuzwid Anantaram Singh was rejected and that of the Government allowed. There is no appeal by Nuzwid Anantaram Singh and therefore the decree passed against him has become final. Kesar Singh has filed the present appeal and the contest in this Court is therefore confined to Kesar Singh and the Government.

Kesar Singh pleaded that Ramabai adopted him and he therefore became entitled to the estate. The Government denied the factum of adoption as well as its validity. For the defence it was alleged that Ramabai had the authority of her husband to adopt and in any event the adoption was made with the consent of her husband's nearest kinsman Jagannath Singh. The Lower Court found in favour of the factum of adoption but held that the consent neither of the husband nor of the kinsman was proved. Another ground taken by Kesar Singh, was, that the suit of the Government was bound to fail as there was in any event an heir of Anantaram Singh in existence. The Subordinate Judge has found on this point in favour of the Government. The third ground of defence was, that Kesar Singh apart from this adoption was entitled to the property being a heritable bandhu of the late Anantaram Singh. On this point again the finding of the Subordinate Judge is against the defendant.

Six points arise for decision:

1. Did Anantaram Singh have no heirs and did the property therefore escheat to the Government?

2. Was the adoption in fact made?

3. Did the widow have her husband's authority or consent to make the adoption?

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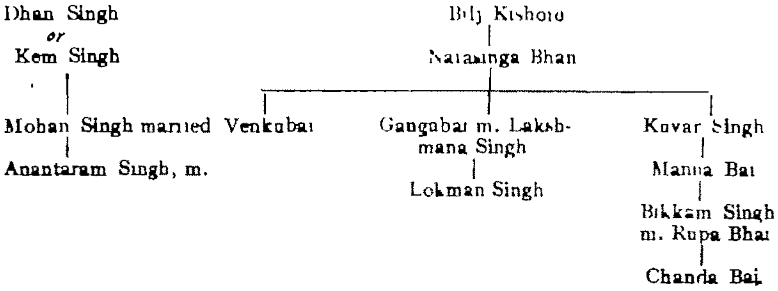
4. Did Jagannadha consent to the adoption?

5. Is his consent sufficient in law to validate the adoption?

6. Is the 2nd defendant a heritable bandhu of Anantaram Singh?

Point No. 1.—The first point I proceed to consider is, whether it has been made out that there was an entire absence of heirs, which alone would render the property escheat to the Government. The 2nd defendant Kesar Singh claims that he is the nearest heir. But for the present I shall assume that he has not made out his title. The question still remains, was there an heir to Anantaram Singh in existence and does the claim of the Government on that account fail? On behalf of the defence one Beecum Singh has been put forward as the heir of the deceased, barring the 2nd defendant. If the relationship alleged between Beecum Singh and Anantaram Singh is true, it is not disputed that Beecum Singh would be a heritable bandhu and would thus exclude the Government. The relationship of Beecum Singh as gathered from the evidence may be set forth in the following pedigree:—



The learned Judge then discusses the evidence and concludes:—

The evidence points irresistibly to the conclusion that there was in existence an heir of Anantaram Singh, namely Beecum Singh, whose existence puts the Government out of Court. It is unfortunate that in this long and important trial such an obvious point was overlooked. I cannot also help noticing the strange course the Government took for establishing the absence of heirs. They chose to examine, in order to prove that there was no heir, two persons who had them-

selves claimed to be the heirs and who in the witness box reiterated that claim.

Point No. 2.—Was the adoption in fact made? The learned Subordinate Judge has found in favour of the factum of adoption.

The learned Judge here discusses the evidence on the point and concludes:—

On my finding on this point the suit of the Government fails. I shall, however, proceed to consider the other points involved in the case. I am not therefore prepared to disturb the finding of the Lower Court that the adoption did in fact take place.

Point No. 3.—Did Anantaram Singh authorise his wife to make an adoption?

[The learned Judges then discussed the evidence] and concludes:—

My conclusion on this point is that it has not been proved that Anantaram Singh authorised the adoption.

Point No. 4.—Did Jagannath Singh consent to the adoption?

The Judge after discussing the evidence on the point thus concludes:—

I am quite aware that from the mere fact that Jagannatha took part in the adoption, it cannot be inferred either that he supposed that he was giving the consent or that there was on his part such exercise of discretion as would render the consent effectual. See *Raghunadha* v. *Sri Brozo Kishoro* (4). But what I desire to say is, that the Judge entirely overlooked the point that the evidence left no room for doubt, that if Jagannatha's consent had been asked, it would not have been withheld. The Judge did not have an opportunity of watching the demeanour of some of the witnesses, notably, Lakshmana Singh. I am not for these reasons disposed to attach much weight to the finding of the learned Judge on this point. In my opinion, the consent of Jagannatha Singh has been proved.

Point No. 5.—The next point that has to be considered is, whether the consent of Jagannatha Singh is sufficient. He was a bandhu, a bhinnagotra sapinda of the deceased being his father's sister's son. It has been contended for the Government that as Jagannatha Singh was not an agnate of the last male owner,

4. (1876) L R 3 I A 154 at 193 : I L R 1 M 69 (P C).

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his consent would not be sufficient. It is urged that the consenting relation must be a male agnate of the deceased. In this case the question whether the consenting relation must be a male or a female does not arise. But it is said that it is only the consent of an agnate that will avail and that although cognates, that is, bhinnagotra sapindas are recognised for purpose of inheritance, they must be disregarded for the purpose of giving consent to an adoption. The law on the subject of kinsmen's consent has gradually been developed in the decisions of the Judicial Committee and though there might have been some indefiniteness in the law at one time, the question is, in my opinion, now free from doubt. The consent that is referred to in the rulings is that of sapindas which term includes both agnates and cognates and not that of agnates alone. To elucidate this point I shall refer to certain rulings of the Privy Council and from them the right principle can be deduced and they incidentally also show how the law on the point has been gradually developed.

The first case where the point was fully considered is Ramnad case [*The Collector of Madura* v. *Muthu Ramalinga Sethupathi* (16)]. In that it was decided that in the case of an undivided family the consent of the adopting widow's father-in-law is both requisite and sufficient. If the father-in-law be dead, the consent of the husband's brothers must be obtained. Where the husband was divided from his co-parceners, the consent of the father-in-law would be similarly sufficient. Where no father-in-law is in existence, the case must depend upon the circumstances of the family. There should be such evidence of the assent of the kinsmen as suffices to show that the act of the widow was done neither capriciously nor from a corrupt motive. In the particular case, the family was a divided one and to examine the soundness of the argument now advanced, it is important to bear in mind that the relations whose consent was held to be sufficient were:

(1) Muthu Veroyee, the adopting widow's mother-in-law;

(2) Muthuswami, the natural brother of Annaswami, the widow's father-in-law and the nearest male relation alive.

Their Lordships after observing that Muthuswami was not a sapinda but only a samanodhaka, added that he was the natural brother of Annaswami and that circumstance might

16. (1868) 12 M I A 397.

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strengthen his title to be considered the natural male protector of Ramaswami's widow.

I refer to this case for the purposes of showing that the contention urged by the Government, that it is the consent of a male agnate that is required, is utterly wrong. Muthu Veroyee was an agnate but was clearly not a male. Muthuswami while being a male was clearly not an agnate in so far as his position was referable to that of the natural brother of Annaswami.

In tracing the development of the law, it is also useful to notice that their Lordships in this judgment advert to two considerations:

(1) Observance of religious duty, and

(2) Heirship to property.

I shall presently show the later development of this branch of the subject. Before passing on from this case I need only observe, that the view was expressed in it, that the consent of every kinsman, however remote is not essential. The expression used in the judgment throughout is "kinsmen" excepting in the last paragraph where the word "sapinda" is used.

The next case is the Chinnakimidi case, *Sri Raghunadha* v. *Sri Brozo Kishoro* (4). In this case the principle was reaffirmed that where the family is undivided the requisite authority is to be sought within the family itself. The relations whose consent is necessary are again described as the husband's kinsmen. While their Lordships recognise the importance of an adoption being a religious act, they again indicate that considerations regarding devolution of property cannot altogether be lost sight of (page 193). One of the propositions of Mr. Justice Holloway from which the Privy Council expresses dissent is, that proximity to the deceased with respect to rights of property is not an element to be considered. (*See* p. 189.)

The next case is the Guntur case, [*Vellanki Venkatakrishna Rao* v. *Venkatarama Lakshmi* (17)] the point actually decided was, that if the adopting widow has not acted capriciously or from a corrupt motive, the Court ought not to minutely examine the motives operating on her mind. These should be proof of assent on the part of the sapindas, their

4. (1876) L R 3 I A 154 : I L R 1 M 69 (P C).
17. (1876) L R 4 I A 1 : I L R 1 M 174 (P C).

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Lordships observed, as should be sufficient to support the inference that the adoption was made upon a fair consideration, by what may be called a family Council, of the expediency of substituting an heir by adoption to the deceased husband. The reference to "expediency" shows that an adoption is not considered wholly in the nature of a spiritual act and that temporal considerations cannot be disregarded. The relations indicated in this case are the deceased husband's "sapindas".

In the next case, *Venkamma* v. *Subramaniam* (18) the facts that arose necessitated a more definite statement of the law. Besides deciding that the quality of the assent in question was bad, it further decided that the consent of one of the two cousins of the deceased was insufficient, the other of the same degree not having been consulted at all. The deceased's relations are again referred to in this judgment as his kinsmen.

We then come to the case of *Veera Basavaraju* v. *Balasurya Prasada Rao* (5), where the doctrine of the kinsmen's consent is fully developed and taken a well-defined and definite form. This case after affirming the rule laid down in the Ramnad case when the family happens to be undivided, lays down the following rules:—

1. Where the husband was at his death in a state of separation, the father-in-law's consent is essentially requisite to the validity of the adoption.

2. If there is no father-in-law, the assent of the divided brothers is equally requisite.

3. If a majority assent and one refuses, his objection may be discounted. (The rule must, on principle, be extended to where the minority consists of more than one).

4. The absence of the consent of the divided brothers or in case there is only one, want of his consent, cannot be made good by the authorisation of distant relatives.

5. The reasons which make the assent of the divided brothers a requisite condition apply *mutatis mutandis* to the case of the nearest sapindas other than brothers.

This case places the law beyond doubt. Where there are relations of various degrees, the consent of the nearest must be obtained. The consent of the majority will be sufficient and if there is only one, his consent will be requisite. The reason for insisting upon the consent of the nearest sapindas is stated to be that they are interested in the well-being of the

5. (1918) L R 45 I A 265 : 36 M L J 40 (P C).
18. (1906) L R 34 I A 22 : 17 M L J 114 (P C).

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widow, (in other words, that they are her natural guardians) or that they are interested in the spiritual welfare of the deceased or in the protection of his estate. I may, in passing, remark that if the nearest sapinda happens to be sufficiently remote, the first two elements exist only in theory. The consideration that uniformly holds good is the third consideration, namely, that pertaining to the devolution of property. In this connection it is useful to note, as indicating the development of the doctrine, the emphasis their Lordships lay upon the temporal aspect of adoption. They point out that although some expressions in the Ramnad case might imply that the question of reversionary interest forms only a secondary consideration, there are other remarks in the same case coupled with the observations in the Guntur case which show that rights to property cannot be left out of consideration. In this connection, they cite, doubtless with approval, the words of Sircar Shastry to the effect that an adoption is more a temporal than a spiritual institution.

The last case of the Privy Council on this point is *Kristnayya* v. *Lakshmipathi* (3). The principles laid down in the previous cases are affirmed and the case is again a distinct authority for the proposition that the consent required is that of a majority of the nearest sapindas.

None of these cases gives support to the theory that the consent must be that of agnates. Dealing with particular facts, their Lordships have sometimes no doubt used the expression "agnates" but it is scarcely right to attach importance to the casual use of a word and lose sight of clearly stated principles. As an instance, I may point out that for the respondent a passage was strongly relied on in the judgment in *Veera Basavaraju* v. *Balasurya Prasada Rao* (5) where the effect of the Ramnad case is stated to be, that in the absence of authority from her husband a widow may adopt a son "with the assent of his male agnates." Can it be said that these words were intended to control the actual decision in the Ramnad case, which, it is clear beyond doubt, as I have shown, is not that the assent of the male agnates is requisite? Far from *Veera Basavaraju* v. *Balasurya Prasad Rao* (5) being an authority for any such position, it clearly shows that the consent that is deemed requisite is that of the husband's sapindas. Are we to ignore the repeated use of the words " sapindas " and " kinsmen " on the ground

3. (1920) I L R 43 M 650 : 30 M L J 265 (P C).
5. (1918) L R 45 I A 265 : 36 M L J 40 (P C).

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that the word 'agnate' is in some places used? The reasons given and considerations adverted to apply equally to cognates, *i. e.*, bhinnagotra sapindas, as to agnates or sagotra sapindas. In the later cases most distinct emphasis is laid upon the reversionary interest of the consenting kinsmen.

If the view urged for the Government is correct, it would follow that in the absence of authority from her husband when there are no agnates living the widow cannot make an adoption at all. A most distant agnate can by giving consent validate an adoption, whereas a very near kinsman, if he happens to be a cognate, cannot give consent. Is this distinction based on any principle? Though under the law cognates are postponed to agnates, several of the former class are more closely related to the deceased than many of the latter class. If the consenting cognates are the immediate reversioners I fail to see why their assent should not be sufficient. They are interested in the protection of the estate and it is their reversionary interest that is affected. Some relations who are cognates are more directly interested in the well-being of the widow and the spiritual welfare of the deceased than many remote agnate relations.

There is nothing in those decisions which, expressly or impliedly, gives countenance to the theory that in regard to consent, cognates stand on a footing different from that of agnates. In the scheme of the Mitakshara succession, cognates are, with the exception of the daughter's son, as a body postponed to agnates. As the consent of the nearer agnates is requisite and sufficient, so the consent, on failure of agnates, of the nearer cognates, would similarly validate an adoption. The rules laid down in the case of agnates, such as the view of the majority prevailing, must *mutatis mutandis* apply also to cognates. Judged from the standpoint of the particular relation being required to fill the position of the widow's natural guardian or to possess an interest in the spiritual welfare of her husband, several cognate relations, as several agnate kinsmen, may be found to lack the necessary qualifications; but the test of propinquity from the point of view of property will be found an unfailing test and a sure guide.

So far I find no difficulty as this conclusion is fairly deducible from the rulings of the Judicial Committee. The Privy Council, however, has had no occasion to make a pronouncement as regards the rank to be assigned to the deceased's mother, his brothers, and his daughter's son if a conflict

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arises amongst them. Although for purposes of succession the order is, the daughter's son, the mother, the father, the brothers, it has now been decided that for the purpose of giving consent the father comes first. The mother according to the Ramnad case has a place, but the question remains where does she come? If the mother consents but the brothers refuse or the brothers consent and the mother refuses, what will be the result? In this scheme, what is the place of the daughter's son? When the contest has reference to this limited group, the point may present some difficulty, and for an obvious reason each one of these relations, on account of close affinity to the widow's husband, holds an important position both from the spiritual and temporal standpoints; but in the case of remoter kinsmen this element of difficulty does not exist. When the point I have indicated has to be decided, the observations of the Judicial Committee in regard to a family council may probably furnish a solution.

One aspect of this question actually presented itself in *Viswasundara Rao* v. *Somasundara Rao* (2) and it was there decided that when the deceased's brothers assented to the adoption the consent of the daughter's son was unnecessary. I refrain from expressing any opinion on the actual point decided in it, although, I must confess, with the greatest respect to the learned Judges, that I am unable to agree with much of the reasoning which supports their judgment. To take only one of the reasons—to say that the daughter's son owes no spiritual duty to the deceased is against the spirit and the letter of the Hindu Law and is opposed to Hindu sentiment. I do not, however, wish to enter into a detailed consideration of the reasons as I am generally in agreement with the criticism of this judgment of Ramesam, J., in *Anne Brahmayya* v. *Chelasami Rattayya* (1).

The point that has to be decided in the present case, however, is, there being no agnate relation and the nearest cognate relation who under the law would be the presumptive reversioner having assented to the adoption, does his consent validate it? In my opinion, it clearly does.

I shall now deal with the sixth and the last point, is Kesar Singh a heritable bandhu of Anantaram Singh? The

1. (1924) 20 L W 503. 2. (1920) I L R 43 M 876.

following pedigree explains the relationship of the parties:—

Dhan Singh *alias* Kesu Singh (wife) Kausalya Bai

Ammir Bai—Doka Singh (husband) | Mohan Singh (wife) Venku Bai

Sundara Bai (husband) Kissen Singh | Jagannatha Singh (wife) Gaura Bai | Padam Singh | Ananta Ram Singh (Propositus) (wife) Rama Bai

Ganga Bai—Ramachandra Singh (husband)

Kesar Singh (adopted son of Rama Bai and 2nd deft.) | Subadra Bai | Surja Bai (husband) Lakshmana Singh | Ranjit Singh.

It is contended on behalf of the Crown that Kesar Singh is not a heritable bandhu of the propositus. The contention is based on what is known as the "line theory" of Professor Rajkumar Sarvadhikari. It is urged on the other side that judged by the tests accepted in the rulings of the highest authority the appellant is entitled to succeed and the doctrine formulated by Sarvadhikari does not find support in the words of the ancient expounders of law.

To deal with these contentions, it is necessary to glance briefly at a few of the leading principles in regard to the law of bandhu succession. The right of bandhus, or kinsmen related to the deceased through females, to succeed, is primarily based upon the text of Yajnavalkya which runs thus:—

"The wife, daughters, both parents, brothers and likewise their sons, gotrajas, bandhus, a pupil and a fellow-student. Of these, on failure of the preceding, the next following in order is heir to the estate of one who has departed for heaven leaving no *putra* (lineal male descendants)."

Let us now turn to Vijnaneswara's commentary, the Mitakshara. The subject is dealt with in Chapter II, Ss. 5 and 6 of Mr. Colebrooke's translation of that work. On failure of brother's sons, says the Mitakshara, (S. 5) gotrajas or agnates share the estate. Paternal grandfather is said to take the inheritance first. Then the order of succession is given of gotraja sapindas. By way of parenthesis, Vijnaneswara says that he is dealing in this section with the succession of samanagotra sapindas only, as bhinnagotra sapindas are indicated by the term 'bandhu.' The Sanskrit words are:

Bhinnagotranam sapindanam bandhu sabdena grahanat.

Here then do we find the definition of the word 'bandhu'. That word is used to indicate bhinnagotra sapindas, the opposite

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of the term is gotraja sapindas or samanagotra sapindas. S. 5, as I have said, deals with the succession of gotrajas. In S. 6, the bandhu succession is dealt with. According to the text of Yajnavalkya cited above bandhus take the estate after the gotrajas and the order of succession among the bandhus is described in S. 6. In this connection it is unnecessary to refer in more detail to this section to which I shall return later.

We have thus seen that the term 'bandhu' is synonymous with bhinnagotra sapindas or sapindas belonging to a different family (gotra). Who then are sapindas? To understand this term, we must first turn to cl. 6 of S. 5. It is there indicated that "the relation of the sapindas ceases with the seventh person." But we must bear in mind that S. 5 is confined, as I have said, to the laying down of the order of succession of gotraja sapindas. The limit of the 7th degree is thus expressly stated with reference to gotraja sapindas of the same family. In the Chapter of the Mitakshara dealing with inheritance (Vyavaharadhyaya) the word 'sapinda' as it occurs in the expression 'bhinnagotra sapinda' has not been defined. In Acharadhyaya (Chapter on the rules of conduct) to which I must now advert Vijnaneswara lays down the rules in regard to marriage.

The author says:

"He should marry a girl who is non-sapinda with himself. Non-sapinda means, not his sapinda. Sapinda relationship arises between people through their being connected by particles of one body."

Vijnaneswara here recognises that the word 'sapinda' understood in this, its etymological sense, may be applied almost to all men and it is necessary to limit it, its signification, to certain definite individuals.

Vijnaneswara proceeds to say that with the object of so limiting it, Yajnavalkya has laid down "after the 5th ancestor on the mother's and after the 7th on the father's side" the relationship of the sapinda ceases.

Panchamat saptamat urdhvam matrutah pitrutah tatha.

This text means, says the Commentator,

"On the mother's side in the mother's line after the 5th, on the father's side in the father's line after the 7th (ancestor) the sapinda relationship ceases."

By this process we arrive at the meaning of the word 'bandhu'. In Vyavaharadhyaya we find that bandhus are described to be bhinnagotra sapindas. This is the first stage. We then find it stated in the Acharadhyaya that the sapinda

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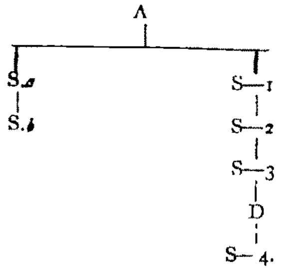
relationship ceases beyond the 5th in the mother's line and beyond the 7th in the father's line. This is the second stage. Putting these two parts of the definition together we arrive at the result that a bandhu is a relation belonging to a different family not removed beyond the 5th degree in the mother's line or beyond the 7th in the father's line. I have so far dealt with the text of Vijnaneswara's commentary upon it.

I shall now pass on to another text, the text of Manu which reads thus:—

Anantarah sapindathyah tasyatasyadhanam bhavet.

which has been understood as meaning "the property of a near sapinda shall be that of a near sapinda". This is the foundation of the doctrine that the relation of sapindaship must be mutual. I shall illustrate this by the following diagram:—



In this diagram *S* represents a male and *D* a female. Are *S. b* and *S*-4 sapindas of each other? *S. b* is connected through his father and is within the prescribed 7 degrees from the common ancestor *A*, but *S*-4 who traces descent through his mother is beyond the limit of 5 degrees from *A*. There is therefore no mutuality of sapinda relationship between *S. b* and *S*-4. This element of mutuality being absent they cannot inherit to each other.

Let me now apply the rules I have so far deduced to the present case. Dhan Singh is the common ancestor of Kesar Singh, the claimant and Anantaram Singh, the propositus. Kesar Singh claims relationship through his mother Gangabai and is 5th in descent from Dhan Singh. Anantaram Singh traces relationship through his father Mohan Singh and is third in descent from the common ancestor. The test of degree as well as the test of mutuality are thus satisfied. If these are the only two tests that are to be applied, Kesar Singh's claim to be a heritable bandhu must be upheld.

This leads me on to a discussion of what I have described as the "line theory" of Professor Sarvadhikari.

Chapter II, S. 6 of Mr. Colebrooke's translation of the Mitakshara must in this connection be referred to.

After having dealt with agnates in S. 5, Yajnavalkya deals with bandhus in S. 6.

He says:—

"On failure of agnates the cognates are heirs; cognates are of three kinds, related to the person himself, to his father or to his mother as is declared by the following text".

The text of Vridhasatatapa is then cited which groups bandhus under three headings:

(1) *Atma bandhus.*—Sons of his own paternal aunt, sons of his own maternal aunt and sons of his own maternal uncle.

(2) *Pitru bandhus.*—Sons of his father's paternal aunt, sons of his father's maternal aunt and sons of his father's maternal uncle.

(3) *Matri bandhus.*—Sons of his mother's paternal aunt, sons of his mother's maternal aunt and sons of his mother's maternal uncle.

Vijnaneswara then proceeds:—

"Here by reason of near affinity atma bandhus are his successors in the first instance, on failure of them pitru bandhus; or if there be none, matri bandhus. This must be understood to be the order of succession here intended."

Professor Sarvadhikari evolves a theory out of this. He proceeds in this way. The bandhus specifically mentioned will, on an examination, be found to belong to certain families and he infers therefrom that heritable bandhus must be restricted to those families. The families are the following:—

1. The family of the propositus.

2. The family of the mother's father of the propositus.

3. The family of the father's mother's father of the propositus.

4. The family of the mother's mother's father of the propositus.

To this Professor Sarvadhikari feels obliged to add the cognate descendants of the propositus.

I shall now state the five groups of bandhus prepared on this basis:

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Family No. 1.—His (propositus's) cognate descendants.

Family No. 2.—Cognate descendants of his agnate ascendants.

Family No. 3.—Descendants of his mother's agnate ascendants.

Family No. 4.—The descendants of his father's mother's agnate ascendants.

Family No. 5.—The descendants of his mother's mother's agnate ascendants.

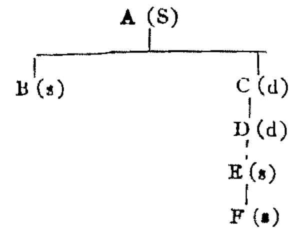
In the present edition of Sarvadhikari's work the bandhus belonging to the first three families are termed Atma bandhus, the bandhus belonging to the fourth family, Pitru bandhus, the bandhus belonging to the fifth family, Matri bandhus. As I have already said, according to this doctrine, a person who does not belong to these five families cannot be a heritable bandhu. First then, we have to ascertain whether applying this rule the claimant is a heritable bandhu of the propositus. Then we have to apply the test of mutuality, that, we have to determine, whether applying the same rule, the propositus is a heritable bandhu of the claimant.

Now taking the facts of this present case, the claimant, from the point of view of the propositus, falls within the five families. Kesar Singh is a cognate descendant of Anantaram's agnate ascendant. But Anantaram, from the point of view of Kesar Singh, does not belong to one of the five prescribed families. Thus, the test of mutuality is wanting. Kesar Singh's claim cannot therefore be upheld if this theory is adopted.

The question is, does this doctrine find support either in any ancient text or recognised commentary. No authority is relied on by the learned author. The result of applying the rule laid down by him is to further narrow the class of heritable bandhus. My remarks are not intended to be a criticism of his theory as such. It may be both logical and rational, but it is the duty of the Court to interpret and apply the law as it stands and I find no justification for accepting the view of Professor Sarvadhikari. This rule has not received the approval of the Judicial Committee.

The learned Government Pleader invites our attention to three cases. The first case he relies upon is *Umaid Bahadur* v. *Udoi Chand* (7).

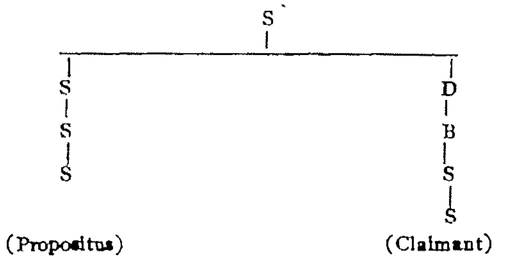
7. (1880) I L R 6 C 119 (F B).



E in the diagram above given was the claimant in the case and the learned Judges held that he could succeed to the estate of *B*, the propositus. This was the point decided and so far there is nothing in the case to support the respondent's contention. Having held that *E* can inherit, the learned Judges went on to state, at the close of their judgment, that *F* would not be a bandhu and no reasons are given. This is clearly an *obiter dictum*. It is suggested, and this seems to be the case, that this decision having been given at the time Sarvadhikari delivered his lectures the learned Judges adopted his view and in the illustration gave expression to it.

Nor did the present question arise in *Babu Lal* v. *Nanku Ram* (8) which is relied on merely because certain observations in the previous case *Umaid Bahadur* v. *Udoi Chand* (7) were cited in the judgment. To remove any misapprehension I must state that at page 345 certain relations are found grouped in five classes, and beyond the mere accident that the families mentioned by Sarvadhikari are also five in number, there is nothing in common between the five groups in this judgment and the five families of Sarvadhikari.

The third and the last case relied on for the respondent is *Chinna Pichu Aiyangar* v. *Padmanabha Aiyangar* (10). The claimant in that case is indicated in the following diagram:—



The claim was disallowed on the authority of *Umaid Bahadur* v. *Udoi Chand* (7). Napier, J., expressly said that he would adopt the view of Sarvadhikari for the reason that *Umaid*

7. (1880) I L R 6 C 119 (F B). 8. (1894) I L R 22 C 339.
10. (1920) I L R 44 M 121 : 39 M L J 417.

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Bahadur v. *Udoi Chand* (7) had never been doubted. This view, however, did not commend itself to the other learned Judge, Sadasiva Aiyar, J., but he agreed with Napier, J., in disallowing the claim on the somewhat curious ground that he is generally against claims by remote relations and that only by legislation the anomalies of the present law could be removed.

I do not think there is such authority as will compel us to accept the view of Professor Sarvadhikari which finds no support in the texts of ancient commentaries and which has the effect of unduly limiting the bandhus who can inherit. Several modern commentators have refused to recognise the dictum of this learned writer as correct. I need only mention Ghose and Sircar Shastri. In the table given in Sir Sankaran Nair's Edition of Mayne, a person is indicated as the heritable bandhu who occupies the position of Kesar Singh although in the table given in the present edition which is apparently modelled upon Sarvadhikari, that relation is omitted.

The subject of bandhu successions was considered at some length in *Ramchandra Martand Waiker* v. *Vinayak Venkatesh Kothekar* (9). Among the tests laid down in the very instructive judgment is not to be found the test now under discussion. Although their Lordships refer to passages in *Umaid Bahadur* v. *Udoi Chand* (7) and *Babu Lal* v. *Nanku Ram* (8) as also to the work of Sarvadhikari, there was no necessity to consider the present point.

It has been suggested that as the authority of Sarvadhikari as an eminent lawyer has been recognised by the Judicial Committee, we must adopt the rule formulated by him on this head. I do not think that this is a safe guide. Now turning to the five families as classified by Sarvadhikari, father's father's sister's son is described as Atma bandhu, whereas according to the text he is a Pitru bandhu. And again, mother's father's brother's son and mother's father's sister's son are according to Sarvadhikari Atma bandhus, whereas they are according to the text Matri bandhus. According to Sarvadhikari again, the bandhus in the first two families must be exhausted before a bandhu in the third family can come in. This view has been dissented from by the Privy Council in *Muthuswami Mudaliar* v. *Sunambedu Muthukumaraswami Mudaliar* (12).

7. (1880) I L R 6 C 119 (F B). 8. (1894) I L R 22 C 339.
9. (1914) I L R 42 C 384 at 394 : 27 M L J 533 (P C).
12. (1896) L R 23 I A 83 : 6 M L J 115 (P C).

In that case mother's brother was preferred to father's father's sister's son, that is a relation in family No. 3 (Sarvadhikari) was preferred to a relation in family No. 2 (Sarvadhikari). At page 409 their Lordships describe a father's father's sister's son as a pitru bandhu which is in consonance with the text but is against the view of Sarvadhikari. It is noteworthy that in *Muthuswami* v. *Muthukumaraswami* (19) which is the decision of the Madras High Court, affirmed by the Privy Council in the last mentioned case *Muthuswami Mudaliar* v. *Sunambedu Muthukumaraswami Mudaliar* (12), the grouping of Sarvadhikari was not accepted. In *Vedachala Mudaliar* v. *Subramania Mudaliar* (20), the dicta of Muthuswami Aiyar, J., in *Muthuswami* v. *Muthukumaraswami* (19) were approved by the Judicial Committee. I have arrived at the conclusion that the view of Professor Sarvadhikari on this point cannot be accepted.

I cannot conclude the discussion of this point without adverting to one matter which I think is of some importance. I have said in the course of this judgment, that in the case of bandhus, sapinda relationship ceases beyond the 5th from the mother and the 7th from the father. This is repeatedly referred to in the judgment of the Judicial Committee in *Ramchandra Martand* v. *Vinayak Venkatesh* (9). The question in that case was whether the plaintiffs who claimed through their mother but who were bhinnagotra sapindas beyond the fifth degree could inherit. It was held that they could not. I refer to this point, because there are some observations in the judgment which may at first sight seem to imply that the limit of sapinda relationship in the case of bandhus ceases with the 5th degree irrespective of whether the claim is traced through the father or the mother. The District Judge has held "that the appellants claiming through their mother and being 6th in descent from their common ancestor Timaji Pant were outside the limits of heritable bandhus recognised by the Mitakshara Law and has no claim." (*See* page 291). This was the view that was affirmed by the Privy Council. There is nothing in the judgment to suggest that their Lordships intended to do away in the case of bhinnagotra sapindas well-recognised distinction dependent upon whether the claim is traced through the father or the mother. The view which their Lord-

9. (1914) I L R 42 C 384: 27 M L J 333 (P C).
12. (1896) L R 23 I A 83: 6 M L J 113 (P C).
19. (1892) I L R 16 M 23: 2 M L J 296.
20. (1921) I L R 44 M 753: 41 M L J 676 (P C).

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ships refused to accept is that of Gopalachandra Sircar Sastri— the view which was pressed before the Judicial Committee by Mr. de Gruyther to the effect that the word "bandhu" includes either all cognate relations without any restriction or at any rate all cognates within seven degrees on both the father's as well as on the mother's side. The distinction to which I have referred is recognised in all works of Hindu Law whether the writer belongs to the school of Sarvadhikari or not. It was not suggested in the course of the arguments before us, that such a distinction does not exist but I have considered it necessary to make these remarks as in what I have stated I have recognised this distinction.

My conclusion therefore is, that Kesar Singh is a heritable bandhu of Anantaram Singh and the claim of the Government must fail on this ground also.

In the result the appeal succeeds and it is allowed and the suit is dismissed. I agree in the order as to costs made by my learned brother.

A. S. V. *Appeal allowed.*

PRIVY COUNCIL.

[On Appeal from the Court of the Judicial Commissioner of Oudh.]

PRESENT :—VISCOUNT DUNEDIN, LORD BLANESBURGH, SIR JOHN EDGE AND MR. AMEER ALI.

Balbhaddar Singh and another ... *Appellants**

v.

Badri Sah and another ... *Respondents.*

P. C.

Balbhaddar Singh v. Badri Sah.

Damages—Suit for malicious prosecution—Essentials to be proved by plaintiff—Termination in his favour of criminal proceedings—Innocence of charge.

In an action for damages for malicious prosecution, the plaintiff has to prove, not necessarily that he was innocent of the charge on which he was tried, but that the proceedings connected with such charge and trial terminated in his favour, if from their nature they were capable of so terminating. *Basebe* v. *Matthews,* 2 C P 688; *Delegal* v. *Highley,* 3 Bing N C 950; *Weston* v. *Beeman,* 27 L. J. Exch. 57; *Huntley* v. *Simson,* 27 L. J. Exch. 134 referred to.

In countries such as India, where "prosecution," in the most literal sense of the word, is not a private act, an action for malicious prosecution could not be brought, strictly speaking, against a private individual; but the giving of information by that individual to the authorities, which naturally leads to prosecution, is tantamount to prosecution, and will ground an action in tort for malicious prosecution.

*P C Appeal No. 66 of 1924. 16th March, 1926.

P. C.

Balbhaddar Singh v. Badri Sah.

Appeal from a decree (6th August, 1923) of the Court of the Judicial Commissioner (Dalal and Cuming, JJ.) reversing a decree (15th May, 1922) of the Subordinate Judge of Kheri (S. A. Hasan, Esq.).

The facts are set forth in the judgment of their Lordships.

L. de Gruyther, K. C. and *B. Dube* for appellants.

A. M. Dunne, K. C. and *T. W. B. Ramsay* for respondents.

16th March, 1926. The Judgment of the Board was delivered by

Viscount Dunedin.

VISCOUNT DUNEDIN :—The appellants and respondents are lambardars and the principal inhabitants in the village of Mohiuddinpur. The suit arises out of circumstances of a remarkable character, which took place in connection with a crime as to which the complete truth will in all likelihood never be discovered.

One Sheo Bux, a humble inhabitant of the village, was last seen alive on the evening of the 17th September, 1919. As he was under police supervision his absence after that date was noticed by the village policeman, but it was supposed that he had gone to some other village.

On the 20th September, a little after noon, a party of four persons arrived at the police office, which is situated at a place called Pasgawan, about two miles from the village. These were Badri Sah, a lambardar in the village, and one of the respondents, Hazari, a cultivator, his son, Raghunath, aged 18, and Bharat, a cultivator. The sub-inspector of police was, at the moment, absent, and a policeman was in charge. Raghunath then proceeded to make a confession, which was recorded in the police diary of the day. The confession was to this effect:—

The appellants had, some time ago, offered him Rs. 500 if he would do away with Sheo Bux. He had returned an ambiguous answer to the proposal. On the 17th September his father had gone away from the village. The appellant Bachchu had then said that this was the opportunity desired. Accordingly when nightfall came the two appellants came to his house and despatched Teja, a barber, 16 years old, to fetch Sheo Bux. They all sat down; then Balbhaddar fell upon Sheo Bux, put his hand on his mouth, while Bachchu grappled with him. With the assistance of Teja and himself, Raghunath, they carried him into the house. He and Teja held his feet. Balbhaddar sat on his chest and held his mouth and

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Bachchu, with a knife, cut his throat and he died. A hole was then dug in the floor of the house and the body buried. He applied for his Rs. 500, but was told by the appellants he would get that when they took the body away. On the 19th September he asked them to take away the body, but they said that they had had no opportunity of doing so. This day, that is the 20th, his father had returned and he told him the whole story. His father went to Badri Sah, who told him to bring Raghunath to him where he was sitting along with Bharat Singh. To them he repeated the story, whereupon they all took him to the police office. After this he was consigned to the lock-up, and the policeman in charge sent a message to the sub-inspector. The sub-inspector hurried back to the village and sent for Raghunath from the lock-up. He repeated to him the same confession, and on being taken to his house pointed out where the body was buried and where the shoes and garments of the deceased were also buried.

The body was exhumed; the shoes and garments found. It was the body of Sheo Bux and his throat was cut. The sub-inspector thereupon arrested Teja and locked him and Raghunath up. The next morning he sent both Raghunath and Teja to Lakinpur, and there, on the 24th September, they were brought before the magistrate. The magistrate, as in duty bound, took a statement from each of them, no policemen being present, and he having duly informed them that he was a magistrate. Raghunath repeated his confession with a little more dramatic detail, but in all essential respects as before. Teja gave a shorter account. He described the murder in identical terms. To each of these confessions the magistrate appended this note:—

"I believe that this confession was voluntarily made. It was made in my presence and hearing. It was read over to the person making it, and was admitted by him to be correct. It contains a full and true account of the statement made by him."

On the 27th October the magistrate, having examined some other witnesses, among whom was Musammat Parbati, the mother of the murdered man, who swore that, on the 17th, she saw the two appellants along with Raghunath and Teja at Raghunath's house, issued warrants for the arrest of the two appellants. The appellants were absent and the warrant was not executed.

On the 30th December the magistrate took up the case, and on the evidence committed Raghunath and Teja for trial,

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but discharged the appellants who, without the execution of the warrant had voluntarily appeared, as he considered there was no real evidence against them except the confessions of Raghunath and Teja. Subsequently, some doubt having arisen in the mind of the District Judge as to whether this dismissal was right, summonses were issued to the appellants to appear before the District Judge. These were taken up by the District Judge, Mr. H. G. Smith, who was not the Judge who had raised the doubts. He again discharged the appellants, considering that there was not sufficient evidence to warrant them being put on their trial.

The trial took place, but when Raghunath and Teja were asked as to their confessions, they both admitted that they had made them, but stated that they were untrue. Raghunath said:—

"I said to Badri that the corpse seemed to be in the house. Badri Sah then took me to his Chaupal and there he gave me *sherbet* to drink. He took me to the police station and asked me to get the names of Bachchu Singh and Balbhaddar Singh recorded, adding that otherwise I would be hanged and that he would defend me. When I reached the police station I felt as if intoxicated. I do not know what I got recorded in the report."

Teja said:—

"The day on which the sub-inspector visited my village, *i. e.*, on Saturday, Badri Sah came to my house at midday and said, 'Raghunath Singh names you. If you say what I ask you, I will get you released.' Thereupon I stated before the Deputy (Magistrate) what Badri Sah and the Sub-Inspector asked me to say. I do not know who committed the murder."

In the end both were discharged, there being, in the view of the Sessions Judge, not sufficient evidence against either of them.

After this the present appellants applied to the magistrate to order the prosecution of Raghunath and Badri Sah. The magistrate gave leave to prosecute under S. 211 of the Indian Penal Code, which is:—

"Whoever, with intent to cause injury to any person, institutes or causes to be instituted any criminal proceeding against that person, or falsely charges any person with having committed an offence, knowing that there is no just or lawful ground for such proceeding or charge against that person, shall be punished with imprisonment of either description for a term which may extend to two years, or with fine, or with both;

"And if such criminal proceeding be instituted on a false charge of an offence punishable with death, transportation for life, or imprisonment for life, or imprisonment for seven years or upwards, shall be punishable with imprisonment of either description for a term which may extend to seven years, and shall also be liable to fine."

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The Sessions Judge on appeal came to a different conclusion as regards Badri Sah, and quashed the leave given. He said in the course of his judgment:—

"I do not think it would be possible to prove that Badri Sah instigated the making of the charge."

The appeal was taken to the Commissioner, but he confirmed the determination of the Sessions Judge.

The appellants then raised the present civil suit for malicious prosecution. The crucial averment was that the respondent Badri Sah had tutored Raghunath and Teja to say what they did in their original confessions. Evidence was led before the Subordinate Judge. The facts which have already been detailed and as to which there could be no controversy were proved. Some other witnesses were examined, as to whose testimony there was controversy, with which their Lordships will presently deal.

Teja, being examined, repeated his recantation of his original testimony, saying that Badri Sah had tutored him. But Raghunath reverted to his original account, saying that the story of the murder having been committed by the appellants with the assistance of Teja was true. The learned Subordinate Judge delivered an exceedingly careful judgment, and came to the conclusion that the plaintiffs, now appellants, had made out their case.

On appeal to the Court of the Judicial Commissioner of Oudh, the Judicial Commissioners reversed that judgment. Unfortunately, however, they took a completely wrong view of the law of the case. In their judgment they put the matter thus:—

"In an action for malicious prosecution the plaintiff has to prove :—

"(1) That he was prosecuted by the defendant.

"(2) That he was innocent of the charge upon which he was tried.

"(3) That the prosecution was instituted against him without any reasonable and probable cause.

"(4) That it was due to a malicious intention of the defendant, and not with a mere intention of carrying the law into effect."

Proposition (2), as stated, is quite erroneous. It should be "That the proceedings complained of terminated in favour of the plaintiff if from their nature they were capable of so terminating." This phraseology may be found in the judgment of Montague Smith, J., in *Basebe* v. *Matthews* (1). But the practice was in accordance with these words long before

1. (1867) L R 2 C P 684 at 688.

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that case. Under the old forms of pleading a declaration, if the law were really as the Judges in this case defined it, would in all cases where there had not been an actual acquittal have been bad if there were not added the statement that the plaintiff was innocent of the crime charged. The reports may be searched in vain for any declaration so found bad, though there were many cases where prosecutions had terminated without acquittal. There was controversy as to what terminated proceedings, as, *e.g.*, whether a *nolle prosequi* of the Attorney-General was a termination. But at any rate it was quite settled that a prosecution comes to an end when a magistrate declines to commit [*Delegal* v. *Highley* (2), *Weston* v. *Beeman* (3), *Huntley* v. *Simson* (4)]. Accordingly in Bullen and Leake's Precedents, 8th Edn., at p. 434, the regular form is given for an action for malicious prosecution when the plaintiff has been arrested and brought before a magistrate. After narrating the arrest and the charge, it continues: "The said Justice having heard the said charge dismissed the same and discharged the plaintiff out of custody, whereupon the said proceedings terminated." In the present case it was sufficient for the appellants to prove, as they have done, that the criminal proceedings threatened on account of the disclosure contained in the confessions of Raghunath and Teja ended so far as they were concerned when the Sessions Judge finally refused to commit them for trial. That opened the way for the proof of the next proposition that the respondents had instigated the proceedings maliciously and without probable cause.

The result of the view of the law taken by the Judges was that the evidence was gone into with a view of saying whether the appellants had proved their innocence, and finally the learned Judges held that "the plaintiffs have failed to prove their innocence of the crime."

It is true that, having stated that "the two main issues in the case are (1) whether the plaintiffs have proved themselves to be innocent of the charge of murder, and (2) whether Badri Sah instigated Raghunath to implicate the plaintiffs falsely," they go on to consider this (2) which, taken by itself, is relevant, but unfortunately their view on the second issue is permeated by their view on the first. Indeed, they say so themselves: "The two issues of the plaintiffs' innocence and Badri Sah's tutoring run into each other." Although, therefore,

2. (1837) 3 Bingh N C 950.

3. (1857) 27 L J Exch 57.

4. (1857) 27 L J Exch 134.

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there are various comments on the evidence in the judgment which are of value, the mistaken view so permeates it as to make it impossible for their Lordships to confirm the judgment as it stands. They are consequently compelled to consider the judgment of the learned Subordinate Judge just as if the appeal had come direct from him to them. Their Lordships will now advert to the evidence given in addition to that which proved the facts which have been already set forth, and it will be convenient to separate that as to which there is no controversy from that as to which controversy exists. It was clearly proved that between the appellants Balbhaddar and Bachchu, who are uncle and nephew, on the one hand, and Badri Sah on the other, there was a long standing and bitter enmity. They were the two principal families in the village and people of influence. The other persons who appear in the course of the case were all in very humble positions. This enmity had shown itself in litigations and prosecutions. Fines had been imposed and punishments inflicted, and there was a state of deadly feud between the two families.

On the night of the 17th a neighbour had heard a noise going on in Raghunath's house, and he had seen two men run out of the house and a light extinguished, but identification was out of the question.

So far as to matters which cannot be controverted. Next as to the evidence as to which there was controversy. Musammat Parbati, the mother of Sheo Bux, said that she remembered Teja coming for Sheo Bux to go to Raghunath's house a little after nightfall. She then said that she got dinner ready and went to Raghunath's house to ask Sheo Bux to come back to dinner. She found there Sheo Bux, Balbhaddar Singh, Badri and Teja all sitting together. In answer to her request Sheo Bux said he did not need dinner as he had eaten already, and that he would not come home; he would take his turn as watchman. On the other hand, it is pointed out that this witness originally made no statement to the police. She was examined twice before the magistrate, and on each occasion she said that the reason why Sheo Bux did not wish to dine was because he had already eaten yams. The post mortem disclosed that there was only pulse and rice in his stomach and not yams. Before the Sessions Judge she was again examined, and she then went back on the statement as to yams, and said that he had only eaten rice. It was her statement that led the magistrate to issue a warrant for the apprehension of the appellants,

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Badri Sah, the respondent, confirmed the statement that he was approached by Hazari, the father of Raghunath, and then by Raghunath, and that after hearing the story he went with them to the police station. He denied having seen Raghunath previously to the joint meeting between him and Hazari. Hazari, it may be noted, had died before the evidence was led in this case. But a schoolmaster deponed that he had seen Badri Sah and Raghunath talking together "in the morning." A man called Bikari said that a day before the confession he went to Badri Sah's house and that, as he approached from outside, he overheard Badri Sah say to Raghunath that if he would not leave out the names of Balbhaddar and Bachchu he would save him. On the other hand, there seems no particular reason for Bikari being at the house. He had a grudge against Badri Sah, and the whole story is contrary to the united story of Badri Sah and Raghunath of the first communication having been made when Hazari brought Raghunath to Badri Sah.

As already stated, the learned Subordinate Judge decreed in favour of the plaintiffs. Their Lordships wish to emphasise their appreciation of the carefulness and ability of the judgment. They have given every weight to the reasoning, although, as will be explained hereafter, they are not able to reach the same conclusion. The reasons which led the Subordinate Judge to reach his conclusions may be summarised thus:—

(1) Not only were the appellants not prosecuted after being brought up before the magistrate, but the idea of their having murdered Sheo Bux rests on no foundation. There was no enmity. Two motives were suggested. One a desire to get his house; but this is not really proved, and, besides, the widow would still have had it. Second, a supposed intrigue between Sheo Bux's wife and Bachchu and also Raghunath. This is only suggested by Badri and Raghunath, and the idea of coparamours plotting together to get rid of a husband is against human experience. Musammat Parbati's evidence was quite unreliable.

(2) The undoubted hatred of Badri Sah to Balbhaddar and Bachchu.

(3) Badri Sah was the person who suggested that Raghunath should go to the police station and confess.

(4) All through the various proceedings Badri Sah was always to the fore. He got his own pleader to undertake the

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defence of Raghunath. All he wanted was that the appellants should be convicted.

(5) There was no reason, if Raghunath had confessed to his father Hazari, that Hazari should have gone to Badri Sah.

(6) The deputy magistrate in the application for sanction under the Indian Penal Code took the view that Badri Sah had tutored Raghunath and Teja. (It is omitted to be stated that two Judges took the opposite view.)

(7) There was no reason for Teja making his first confession voluntarily. He was not in danger if he kept quiet. *Ergo* it seemed to be inspired by Badri Sah.

(8) Raghunath is utterly untrustworthy. He confessed, recanted and then reconfessed. Teja only once recanted and then adhered to it.

There is much in this reasoning, but what, in their Lordships' opinion, the learned Subordinate Judge has a little left out of view is that this is not a case which must be determined on a balance of probabilities. The question is not, "Did the appellants commit the murder?" or, "Did Badri Sah invent the murder against them?" the two queries exhausting the possibilities of the situation. The question is, "Have the appellants proved that Badri Sah invented and instigated the whole proceedings for prosecution?" Of course there is nothing in the point which seems to have been taken in the Courts below but which was not urged before their Lordships, that here *de facto* the appellants were not prosecuted by the respondent. In any country where, as in India, prosecution is not private, an action for malicious prosecution in the most literal sense of the word could not be raised against any private individual. But giving information to the authorities which naturally leads to prosecution is just the same thing. And if that is done and trouble caused an action will lie. But it must be kept in view that, so far as the police were concerned, there was ample cause for the initiation of prosecution proceedings. There were the clear narratives of two people, Raghunath and Teja, concurrent in all necessary particulars. The appellants must, therefore, go the whole way. There is no halfway point of rest. They must show that Badri Sah invented the whole story as far as it implicated the appellants, and tutored Raghunath and Teja to say it. That is a very heavy onus of proof, and unless they sustain it the appellants must fail.

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Let the view which must be taken, if the appellants are to prevail, be analysed. As to the fact of a murder there is no doubt. That the corpse of the murdered man was lying beneath the floor of Raghunath's cottage is also without doubt. One of the suggestions in Raghunath's evidence was that the corpse had been put there by somebody else and that he discovered its existence owing to the progress of putrefaction. This is an unlikely story, but it does not matter. Nobody supposes, nor was it suggested, that Badri Sah murdered Sheo Bux. His first knowledge of the existence of the corpse must have come from Raghunath, and whether Raghunath told him that he himself was implicated in the murder, or whether he merely told him he had found a corpse, is for the moment immaterial. For in either case Badri Sah must have, according to the theory, said to himself: " Now is my opportunity; let me get my enemies implicated in the crime," and this he is supposed to have done. He goes with Raghunath and Hazari—it is a pity that Hazari was dead before the evidence in the case, and there is no trace at all in the papers of his evidence before the magistrate—and Raghunath makes his first confession. What is that confession? It implicated himself and the appellants, but it also implicated Teja. Now it is very important to notice that Teja by all accounts had not met Raghunath and Badri Sah till after Raghunath's confession. For this is what he, Teja, says in his recantation, which is, of course, the foundation of the appellants' case:—

"I did not call away Sheo Bux to Raghunath's house. The day on which the Sub-Inspector visited the village, that is, the Saturday, Badri Sah came to my house at midday, and said: 'Raghunath Singh names you. If you say what I ask you, I will get you released.' Thereupon I stated before the Deputy Magistrate what Badri Sah asked me to say."

What an extraordinary risk this was to tutor a confession which implicated not only his enemies but a man whom he had not yet interviewed, and why bring in Teja at all?

It is, of course, quite useless to pin any faith to what Raghunath and Teja have said. Raghunath had executed a double somersault in confession, Teja a single one, and yet, unless Teja's confession is strictly true, the appellants' case is gone.

The argument was used why should Teja recant except to speak the truth? The answer is easy enough. The appellants had got off by not being committed for trial. Teja and Raghunath then wanted to save their own skins. No doubt Teja stuck to his recantation. Raghunath, who had by this time been let off, had no skin to save and recanted again. The

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very argument which has to be used to explain Teja's first confession may be used to explain his second. Fear was what prompted him, it is said, to make his first confession and implicate himself, though quite innocent. "Raghunath has mentioned you. You will be lost unless you say what I tell you." So fear would drive him to his second. "I have implicated myself foolishly. Let me now say I had nothing to do with it."

Lastly, as to Badri Sah's meddling with the case. That Hazari, if he was told the story by his son, would go to Badri Sah is likely enough. He would wish advice from some one in position, and Badri Sah was the only person except the incriminated men themselves. Further that when Badri Sah found that his enemies were implicated, he would be glad and would help to bring about their downfall is more than probable. But that is a different thing from being the sole author of it.

On the whole matter, therefore, their Lordships feel that while there is grave cause for suspicion and while the whole truth in the case is impossible to find, there is not sufficient certainty in this doubtful matter to find that the appellants have discharged the heavy onus laid upon them. The result arrived at by the Judicial Commissioners on appeal was right, though the methods by which they reached that result were wrong.

Their Lordships will therefore humbly advise His Majesty to dismiss the appeal with costs.

Solicitor for appellants : *H. S. L. Polak.*

Solicitors for respondents : *Barrow, Rogers* and *Nevill.*

A. de M. *Appeal dismissed.*

PRIVY COUNCIL.

[On Appeal from the High Court of Judicature at Allahabad.]

PRESENT:—VISCOUNT DUNEDIN, LORD BLANESBURGH, SIR JOHN EDGE AND MR. AMEER ALI.

Seth Lakhmi Chand ... *Appellant**

v.

Musammat Anandi and others ... *Respondents.*

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Hindu Law—Joint family—Ekrarnama or agreement by co-sharers disposing of their shares after death—Clause as to interest of widow—Legal effect of Ekrarnama as joint will—Effect as family arrangement.

An *ekrarnama* executed by two members of a joint Hindu family, purporting to dispose, as from the date of their deaths, of the family property is not valid

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in law to take effect as a devise or will, or destroy the right of survivorship arising under the ordinary Hindu Law of Succession. *Vitla Butten* v. *Yamenamma,* 8 M H C R 6, and *Lakshman* v. *Ramchandra,* 7 I A 181, approved and followed.

But it may be good evidence of a family arrangement contemporaneously made and acted upon by the parties; and, as one co-sharer in a joint family is entitled, *without* partition, but *with* the consent of all his co-sharers to mortgage or charge for his own purposes the share to which he would be entitled on partition of the family property a provision is valid in such *ekrarnama* that the wife of one of the parties thereto should, after his death, take a life-interest in a moiety of the joint property equivalent to the interest which the widow of a sonless and separated Hindu would have in her deceased husband's estate, notwithstanding the possible or eventual birth of male issue to the survivor of the two co-sharers. *Subbarami Reddi* v. *Ramamma,* I L R 43 M 824, *Sadabart Prasad Sahu* v. *Foolbash Koer,* 3 Ben L R 31 (F B) approved and followed. *Baijnath Prasad Singh* v. *Tej Bali Singh,* 48 I A 212 referred to.

Appeal from a decree of the High Court (Sir E. G. Mears, C. J. and Sir P. C. Banerji, J.) dated the 21st November, 1922, confirming a decree dated the 18th July, 1919 of the Subordinate Judge, Meerut (Piarey Lal, Esq.), who dismissed the appellant's suit.

The document, and the material facts, are set out in their Lordships' judgment.

Sir George Lowndes, K. C. and *E. B. Raikes* for appellant.—The document of the 5th June, 1915, was not a valid disposition of the joint property of the family (apart from the separation thereof) whether as a will, a contract, declaration, or otherwise. The deceased, Baldeo Sahai, had no share of the joint family property of which he could dispose by will; and neither he nor the appellant, nor both of them together, could validly make such a disposition of property as this document purported to make. The family remained joint till the death of Baldeo Sahai, as the Courts in India have concurrently and correctly have found, and, on his death, the whole property survived to the appellant, subject to the rights of maintenance, etc., of his widow and daughter.

A. M. Dunne, K. C. and *B. Dube* for the respondents.—The document is either a joint will, or a family settlement, which binds the appellant; and, having regard to the facts and circumstances found by the Lower Courts, he is now estopped from impugning its validity as either, and is not entitled to any relief.

(In the course of the argument the authorities were cited which are referred to in their Lordships' judgment.)

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15th March, 1926. The Judgment of the Board was delivered by

SIR JOHN EDGE.—This is an appeal from a decree, dated the 21st November, 1922, of the High Court at Allahabad, which confirmed a decree, dated the 18th July, 1919, of the Subordinate Judge of Meerut by which the suit had been dismissed.

The suit had been instituted in the Court of the Subordinate Judge on the 5th June, 1918, and by the plaint in it the three following declarations were claimed:—

(a) The will, dated 5th of June, 1915, and registered on the 9th of June 1915, executed by the plaintiff and Baldeo Sahai, deceased, on account of its being against the rules of succession under the Hindu Law, is absolutely invalid and null and void and it has no effect upon the right of survivorship of the plaintiff in respect of the estate, business, the zamindari, landed and house properties, bonds, mortgage deeds, promissory notes, money-lending business with *asamis* on account-books, parole debts, cash, gold and silver ornaments, conveyance, household and estate goods and articles of convenience and comfort, etc., of all kinds, belonging to the joint Hindu family.

(b) Defendant No. 1 now has and defendants Nos. 2 to 5 will in future have no right of any kind in respect of the estate, business and zamindari properties, etc., given in relief A.

(c) The plaintiff is the owner in possession of the entire estate, business and zamindari properties, etc., given in relief A.

The document in respect of which the declarations are claimed is described in the plaint as a joint will of Baldeo Sahai and the plaintiff Seth Lakhmi Chand, and is in the written statement of Musammat Anandi, the first and principal defendant, described as an *ekrarnama,* that is, an agreement.

The parties to the document in question were and the parties to the suit are Hindus, by caste Brahman Bohra, subject to the law of the Mitakshara, of the school of Benares. The document in question was written by one Ram Chandar Sahai of Khatauli on stamped paper which had been purchased by Baldeo Sahai on the 5th June, 1915, and was signed and executed on the same day by Baldeo Sahai and his younger brother Lakhmi Chand, the plaintiff, in the presence of five men who signed the document as witnesses. It was presented for registration on the 8th June, 1915, at the office of the Sub-Registrar of Jansath, in the district of Muzaffarnagar, by Lakhmi Chand, who, having admitted in the presence of the Sub-Registrar the execution and completion of the document, it was registered on the 9th June, 1915, by the Sub-Registrar.

Baldeo Sahai died on the 10th June, 1915. He had had by a first wife, who had died before the 5th June, 1915, a

daughter, who was then dead and had left three minor sons who were living on the 5th June, 1915, and are the defendants 3, 4 and 5. Baldeo Sahai left surviving him his second wife, Musammat Anandi, who is the defendant 1, and an unmarried daughter, who is defendant 2. Baldeo Sahai had no son or other descendant of him. Lakhmi Chand had on the 5th June, 1915, five daughters living, but no son. Baldeo Sahai and Lakhmi Chand were on the 5th June, 1915, and until the death of Lakhmi Chand on the 10th June, 1915, the sole co-sharers in a joint Hindu family. Lakhmi Chand was then over 40 years of age.

The following is a copy of the document in question:—

"I, Pandit Baldeo Sahai, first party, and I, Pandit Lakhmi Chand, second party, sons of Pandit Jagram Das, caste Bohra Brahman, residents and 'raises' of 'qasba' Khatauli, pargana Khatauli, district Muzaffarnagar, do declare as follows:—

(1) We, both the parties, are full brothers and are members of a joint Hindu family according to the Hindu Law. We are joint in the business relating to the estate, in zamindari property, field or house property, bonds, mortgage deeds, notes-of-hand, promissory notes, money-lending business with tenants under account-books, and parole debts, cash, gold and silver ornaments, conveyances, household goods and paraphernalia of the estate and all other things of every description, of the value of lakhs of rupees.

(2) None of us, the two members of the joint family, has any male issue, but we have female issue and a wife each.

(3) As it has often been seen that disputes and litigations have taken place among persons of property and wealth and their survivors, we, both the parties, in order to avoid future disputes, do, in a sound state of body and mind, of our own accord and free-will, without the instance or instigation of any one else, make this declaration, which shall be binding on ourselves and our representatives, that in the event of one party dying without any male issue, the name of his widow shall be entered in public papers, that the party remaining alive shall have no objection to the same, that if the surviving party has male issue, in that case, after the death of the widow of the deceased party, the son or the sons of the other party shall be the owner or owners of the entire estate, that the daughters or their sons shall have no right as against the son or sons of the other party, and that the widow of the deceased party shall have no right at any time to make any transfer whatsoever.

(4) The daughters or their male issue shall be entitled to the estate of their father only when both the parties die without any male issue. If any of the parties has any male issue, the female issue or the daughter's sons of any of them shall not get any property whatsoever.

(5) The first party has at present an unmarried daughter by his second wife and three minor sons of his deceased daughter by his senior wife, since deceased, who shall be entitled to get equal shares in the estate subject to the conditions given in paragraph No. 4. If the said daughter also, who is at present unmarried, does not give birth to any male issue, then the daughter's sons

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and not the members of the family of the said (unmarried) daughter's husband, shall be entitled to the whole estate.

(6) I, the second party, have five daughters. They, and in case of the death of any of them, her male issue, shall, subject to the conditions given in paragraph No. 4, be heirs to the estate in equal shares. If any of the daughters die without leaving any male issue, the members of the family of her husband shall have no right, but her share in the estate shall be divided among the remaining daughters and their male issue in order.

(7) If we, both the parties, at any time in our life, divide the estate by our mutual agreement or on account of any dispute, then this document shall not be binding on any party provided that none of us has any male issue. If any of us shall have any male issue, he shall be the owner of the entire estate. The widows shall have only life-interest. The daughters, their issue or any other party shall have no right to it.

(8) We, both the parties, have, up to this time, have been jointly managing all the estate affairs and shall continue to manage it in the same way, provided no partition takes place. After the death of one party all managements relating to the estate shall be made by the surviving party. The wife of a deceased party shall have no right to get the property partitioned in the life of the other party, but shall continue to get her share of the profit from the other party after deducting the expenses relating to the estate. If the other party evades the payment of the profits, she shall be entitled to seek remedy in Court only for recovery of profit.

(9) The residence of us, both the parties, shall be separate in this way that in enclosure No. 65, situate in the 'abadi' of bazar, 'qasba' Khatauli, the party alive shall let the widow of the other party live in any house she might choose, and shall not turn her out of it, but the widow of the said deceased party shall have right of easement and residence only to the said house. She shall have no concern with other houses. The party alive shall be at liberty to change the condition of the enclosure or to build a separate house for the female members of his house and take up his abode in it and have any of the houses or shops which exist in that enclosure as his sitting room.

(10) Season fruits such as mango, etc., shall be given by the party alive to the widow of the deceased party to the extent of about one-half (of the produce).

(11) The parties have got this document written after mature deliberation and after having fully understood the contents thereof. They have admitted and accepted the same of their own accord. None of the parties shall have any express or implied objections to this. We have, therefore, executed this agreement by way of a will, in order that it may serve as evidence.

Note:—In the 6th line of the 2nd page of this document, a mark is made and the words, "situate in the 'abadi' of bazar of 'qasba' Khatauli are written on the margin."

Signature of Baldeo Sahai, in autograph.
Signature of Lakhmi Chand.

It has been held by the Subordinate Judge and by the High Court in appeal that the document in question was a valid will of the two brothers. Whether it could operate as such will be presently considered.

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It is now desirable to consider what was the position on the 5th June, 1915, before the document in question was executed. The property to which the suit relates was of considerable value; it was valued for the purpose of jurisdiction, as appears by the plaint, at Rs. 1,00,000 (one lakh). Baldeo Sahai was seriously ill and was not expected to recover. If he died as a member of the joint family his widow would be entitled to maintenance only, and the joint family property would vest in Lakhmi Chand by survivorship. If it could lawfully be agreed that the widow, Musammat Anandi, should on the death of Baldeo Sahai have and enjoy an interest in a moiety of the joint property equivalent to that of the widow of a sonless and separated Hindu, she would on the death of Baldeo Sahai be entitled for life as such widow to a moiety of all the profits of the immoveable property, and to a moiety of all the profits of the moveable property, which belonged to the joint family.On the 5th June,1915,Baldeo Sahai could have separated from Lakhmi Chand by one word and would have been entitled to a partition of all the joint family,and if he had separated his widow, Musammat Anandi, would on his death be entitled for her life as the widow of a sonless and separated Hindu to a Hindu widow's interest in the property, and on her death the property in which she would have a Hindu widow's interest would go to the person entitled to it on her death who would not necessarily be Lakhmi Chand, or a descendant of him. There was some evidence that before the 5th June, 1915, Baldeo Sahai was making preparation for a partition, but that need not now be considered, for as the fact was Baldeo Sahai and Lakhmi Chand did not separate but remained joint until Baldeo Sahai died on the 10th June, 1915. But that the risk of a partition might at any moment occur and was in the contemplation of Baldeo Sahai and Lakhmi Chand when they executed the document of the 5th June, 1915, is apparent from a perusal of that document.

It is admitted in the plaint that Baldeo Sahai fell seriously ill and desired "that after his death the name of his widow, defendant No. 1, should be entered in respect of his share in the joint property, and that after the death of the said widow his share in the property should devolve upon his daughter and daughter's sons," and that a document to effect that object should be executed, and that the plaintiff and Baldeo Sahai jointly executed the document in question " by way of a will." Baldeo Sahai could, from a legal point of view, have no interest

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in the joint property after he died. His interest in the joint property terminated with his life. What was meant by "his share in the joint property" was a moiety of the joint property which he would have had on a partition. After Baldeo Sahai's death Lakhmi Chand entered the name of Musammat Anandi in the revenue papers in respect of a moiety of the zamindari property.

The document in question could not, however, operate as a will. In *Vitla Butten* v. *Yamenamma* (1), the High Court at Madras held that a will by a member of a joint Hindu family of his co-sharer's interest was not a valid devise. In *Lakshman Dada Naik* v. *Ramchandra Dada Naik* (2), the Board, referring to that case, stated that:—

> "Its," the High Court's, "reasons for making distinction between a gift and a devise are that the co-parcener's power of alienation is founded on his right to a partition; that that right dies with him; and that, the title of his co-sharers by survivorship vesting in them at the moment of his death, there remains nothing upon which the will can operate."

It was held by the Board in *Brijraj Singh* v. *Sheodan Singh* (3), that a will, which did not operate as a will at all, was good evidence of a family arrangement contemporaneously made and acted upon by all the parties. In the present case their Lordships hold that the document of the 5th June, 1915, is good evidence of a mutual agreement by Baldeo Sahai and Lakhmi Chand. What interest Musammat Anandi took under that mutual agreement is the only question which their Lordships need consider.

It is well established law that a co-sharer in a Mitakshara joint family without having obtained partition can with the consent of all his co-sharers mortgage or charge the share to which he would be entitled on a partition of the joint family property, but the consent of all the co-sharers must be obtained, and as pointed out by Sir John Wallis, C. J. in *Subbarami Reddi* v. *Ramamma* (4), a father who is a co-sharer with a minor son cannot give such a consent for his minor son.

Their Lordships have come to the conclusion that the right of a co-sharer in a Mitakshara joint family property, who has obtained the consent of his co-sharers to charge his undivided share for his own separate purposes has long been recognised.

In 1869 in *Sadabart Prasad Sahu* v. *Foolbash Koer* (5), which related to a Hindu joint family governed by the law

1. (1874) 8 M H C R 6. 2. (1880) L R 7 I A 181 (P C).
3. (1913) L R 40 I A 161 : 25 M L J 188 (P C).
4. (1920) I L R 43 M 824. 5. (1869) 3 Beng L R 31 (F B).

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of the Mitakshara, Sir Barnes Peacock, C. J., in delivering the judgment of a Full Bench of the Calcutta High Court, consisting of himself and Kemp, L. S. Jackson, Macpherson and Glover, JJ., held that a member of a joint Hindu family had no authority, without the consent of his co-sharers, to mortgage his undivided share in a portion of the joint property, in order to raise money on his own account and not for the benefit of the joint family. That implies that with the consent of all his co-sharers a member of a Hindu joint family can grant for his own purposes a valid mortgage of so much of the joint family property as would not exceed his share on partition. That principle that a member of a Hindu joint family can, with the consent of his co-sharers, charge for his own purposes the share in the joint family property which would come to him on a partition has been recognised by the Board in *Baijnath Prasad Singh* v. *Tej Bali Singh* (6), and cannot now be questioned as a principle of Hindu law. It appears to their Lordships that the same principle of the effect of the consent by the co-sharer applies in the present case and that Baldeo Sahai and Lakhmi Chand were competent to agree and did agree that Musammat Anandi should on the death of Baldeo Singh, have and enjoy for her life an interest in a moiety of the joint property equivalent to the interest which the widow of a sonless and separated Hindu would have in her deceased husband's estate, and that the interest which she obtained by the mutual agreement of Baldeo Sahai and Lakhmi Chand should continue for her benefit for her life, notwithstanding the birth, if it should happen, of "male issue" to Lakhmi Chand.

Their Lordships will humbly advise His Majesty that plaintiff is not entitled to any of the declarations claimed in the plaint, that the appeal should be dismissed with costs, and that the right of the person or persons who may claim to succeed the defendant Musammat Anandi on her death must be determined, if disputed, when the occasion arises, and not in this suit.

Solicitors for appellant : *T. L. Wilson and Co.*

Solicitor for respondents : *H. S. L. Polak.*

A. de M. *Appeal dismissed.*

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6. (1921) L R 48 I A 195 at 212: 40 M L J 387 (P C).

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—MR. JUSTICE DEVADOSS AND MR. JUSTICE WALLACE.

Challa Abbireddi and others ... *Petitioners** (*Petitioners in O. P. No. 165 of 1924 on the file of the District Court of Guntur*)

v.

Challa Venkatareddi (Insolvent) and another ...*Respondents* (*Respondents in do.*).

Abbireddi v. Venkatareddi.

Provincial Insolvency Act (V of 1920), Ss. 5 and 75—Insolvency Court—Review—Powers of—Adjudication—Order annulling—Creditor tendering proof—If an aggrieved person.

A person who had been adjudicated insolvent under the Provincial Insolvency Act (V of 1920) failed to apply for discharge within the time fixed and thereupon the adjudication was annulled. Two of his creditors who had tendered proof of their debts applied to the Insolvency Court to review the order of annulment, but the Court held it had no power to review its order and dismissed the application. *Held,* (1) under S. 5 of the Act, the Insolvency Court had the same powers and had to follow the same procedure as in the exercise of its ordinary civil jurisdiction and hence it had power to review its orders. *The Official Receiver, Tanjore* v. *Nataraja Sastrial,* I L R 46 Mad 405; *Mannu Lal* v. *Kunj Bihari Lal,* I L R 44 All 605 followed; *Arunagiri Mudaliar* v. *Kandaswami Mudaliar,* 19 L W 418 distinguished; and (2) the petitioners being creditors who had already tendered their proof were persons aggrieved by the order of the Court. *In re Henry Langtry,* 1 Manson 169; *Ex parte Ditton, In re Woods,* 11 Ch D 56 followed.

Petition under S. 115 of Act V of 1908 and S. 107 of the Government of India Act praying the High Court to revise the order of the District Court of Guntur dated 27th January, 1925 in O. P. No. 165 of 1924 in I. P. No. 46 of 1920, praying to excuse the delay in filing the said O. P. No. 165 of 1924 to review the order of the said Court annulling the order of adjudication in I. P. No. 46 of 1920.

Ch. Raghava Rao and *A. Sundaram Aiyar* for petitioners.

Respondents not represented.

The Court delivered the following

JUDGMENT:—The first respondent herein was adjudicated an insolvent in I. P. No. 46 of 1920 on the file of the District Court of Guntur. As he failed to apply for discharge within the time fixed, his adjudication was annulled. The petitioners are some of the creditors and they applied to the District Court to have the order of annulment reviewed. The learned Judge thought that the petitioners had a good case on the merits but declined to grant the review as he thought that he

*C R P No. 554 of 1925. 17th December, 1925.

Abbireddi v. Venkatareddi.

had no power to review an order made in the exercise of insolvency jurisdiction. The petitioners have preferred this revision petition against his order.

S. 5 of the Provincial Insolvency Act (V of 1920) says:

"Subject to the provisions of this Act the Court, in regard to proceedings under this Act, shall have the same powers and shall follow the same procedure as it has and follows in the exercise of original civil jurisdiction."

The Court exercising ordinary original civil jurisdiction has power to review its orders. There is no warrant for the proposition that a Civil Court cannot correct its own orders or cannot modify any order which it has passed when it finds that the order is patently wrong. The power of review is inherent in the Civil Court and in what cases it can be exercised is laid down in O. 47. When an Insolvency Court has the same powers and follows the same procedure as a Civil Court exercising ordinary original civil jurisdiction, it cannot reasonably be contended that the power to review has been taken away. Under the English Bankruptcy Act the power to review is specifically given—*vide* S. 108. Such provision is not specifically enacted in the Provincial Insolvency Act as the Insolvency Court is invested with jurisdiction which an ordinary Civil Court has in the exercise of its original jurisdiction.

This point has been specifically dealt with by Spencer, J., in *The Official Receiver, Tanjore* v. *Nataraja Sastrial* (1). In *Mannu Lal* v. *Kunj Bihari Lal* (2) a bench of the Allahabad High Court held that a District Judge was competent to review his judgment in appeal. They observe at page 606:

"We are content to say that, in our opinion, the District Judge had jurisdiction to review his own order, because S. 5 of the Provincial Insolvency Act, No. V of 1920 gave him, when sitting as an appellate Court, the same powers under the Code of Civil Procedure which he would have had if he had been sitting to hear any ordinary appeal."

In spite of these two rulings the learned Judge thought that the decision in *Arunagiri Mudaliar* v. *Kandaswami Mudaliar* (3) was against his power to review his own order and he could not therefore review it. In *Arunagiri Mudaliar* v. *Kandaswami Mudaliar* (3) the question of the power of review of an Insolvency Court was not raised. One of the questions there was whether the time fixed for an application for discharge by the insolvent could be extended or not. Krishnan, J., was of opinion that he could; but Waller, J., thought that the Court had no power to extend the time fixed for an application for

1. (1922) I L R 46 M 405 : 44 M L J 251.
2. (1922) I L R 44 A 605. 3. (1923) 19 L W 418.

discharge by the insolvent and that the provisions of S. 43 were obligatory on the Court to annul the adjudication if an application was not made within the time fixed. It is not necessary to deal with this case in detail as the point raised here did not arise for decision there. If an expression of opinion is necessary, we would be inclined to hold with Krishnan, J., that the Court has power to extend the time for making an application for discharge, provided that the application is made before the order of annulment is made of. The *Arunagiri Mudaliar* v *Kandaswami Mudaliar* (3) case does not decide anything about the power to review an order and the learned District Judge was not right in thinking that that decision stood in the way of granting a review.

The next point is whether the petitioners are persons aggrieved. It has been brought to our notice that at least two of them have tendered their proof. If they have tendered their proof, they are creditors and they are persons aggrieved by the order of the Court annulling adjudication. It was held in *In re Henry Langtry* (4), that a creditor who had tendered his proof was a person aggrieved within the meaning of S. 104 of the English Bankruptcy Act. In *Ex parte Ditton, In re Woods* (5), the Court of Appeal held that a person who had not tendered his proof was not entitled to appeal as a person aggrieved. Seeing that two of the petitioners have already tendered their proof, they are entitled to maintain this appeal.

The appeal is allowed and the order of the learned Judge is set aside and he is directed to restore the application of the petitioner to file and dispose of it on the merits after taking such evidence as he may think necessary. Costs to abide the result.

T. S. V. *Petition allowed and case remanded.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—MR. JUSTICE SPENCER AND MR. JUSTICE MADHAVAN NAIR.

The Municipal Council, Tuticorin, by its Chairman ... *Petitioner* (Defendant)*

v.

T. Shanmuga Moopanar ... *Respondent (Plaintiff).*

Madras District Municipalities Act (V of 1920), S. 249 and Sch. V, cl. (a) —Grain—If includes rice and broken rice—Licence—If necessary for storing rice.

The term "grain" in Sch. V, cl. (a) of the Madras District Municipalities Act does not include rice or broken rice. No licence is necessary in respect of a

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*C R P No. 553 of 1923. 21st September, 1925.

3. (1923) 19 L W 418. 4. 1 Manson 169. 5. (1879) 11 Ch D 56.

godown in which rice and broken rice are stored for purposes of wholesale trade, where the notification under the Act required licences to be taken out by wholesale dealers in grain.

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Petition under S. 25 of Act IX of 1887 praying the High Court to revise the decree of the Court of the District Munsif of Tuticorin, dated 18th December, 1922, in S. C. S. No. 858 of 1922.

B. Sitarama Rao with him *P. N. Marthandam Pillai* and *Chidambaram Pillai* for petitioner.

M. S. Vaidhianadha Aiyar for respondent.

The Court delivered the following

Spencer J.

JUDGMENTS:—*Spencer, J.*:—The Tuticorin Municipal Council, which through its Chairman preferred this Revision Petition, resolved to require wholesale dealers in grain to take out licences under S. 249 of the Madras District Municipalities Act (V of 1920) and accordingly published a notification under S. 328 in the *Tinnevelly District Gazette*. The respondent, who was one of such wholesale dealers, paid the fees demanded of him under protest and brought a suit in the Small Cause Court to recover what was illegally collected from him. He succeeded in obtaining a decree for a portion of his claim. The District Munsif held that he was not liable to take out licences for godowns in which rice and broken rice, etc., were stored for wholesale trade but only for grain stores. It is contended for the petitioner that the word "grain" in Sch. V (*o*) to the Act includes rice and broken rice. The District Munsif observed:

"Paddy without husk is rice. Rice is not a seed and does not sprout out. Hence rice or broken rice cannot be called a grain."

If the District Munsif meant by this that the distinction between grain and rice depended on the existence or absence of the power of germination, I think he went near the mark without hitting it. The germ or seed is in the rice. The outer husk merely serves as a protection from water and other external agencies which would penetrate and destroy the germ.

In the English language "corn", which is derived from the same Latin word "*granum*" as "grain" is, is commonly used to mean the grain of certain cereals, specially wheat in England, and maize in America, while growing. Thus an Englishman would speak of a field of growing wheat as a field of corn, but he would never include other plants grown from seed such as turnips, clover, mustard, etc., under the head of "corn". After the wheat is harvested and threshed it is still corn and it is sold

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Spencer, J.

in a corn market, but after it has gone through a mill and become flour or meal, the individual corns or grains cannot be distinguished, and a substance is produced which is not corn or grain but something else. This meaning of the word "grain" was brought out in a case that went up to the House of Lords and is reported in *Cotton* v. *Vogan and Co.* (1), Lord Herschell in interpreting the meaning of the words which occur in the Metage on Grain (Port of London) Act of 1872 "In respect of all grains brought into the port of London for sale," observed,

"If the Legislature had intended to include what had always been regarded and treated as manufactured articles such as flour and meal, as distinguished from the natural products of the earth *untreated except by gathering,* the language would have been altogether different."

Using similar language I would say that if the Madras Legislature intended to include in Sch. V (*o*) rice and broken rice, which have gone through a certain process as distinguished from the natural products of the earth untreated except by gathering, the storing of which without a licence may be prohibited by any Municipal Council, they would have used more explicit language to denote their meaning. In clauses (*b*) and (*q*) (proviso) the word "paddy" occurs and in cl. 1 the word "flour" is used. There is, therefore, no reason to regard the word "grain" in cl. (*o*) as being used in the comprehensive sense of all articles of commerce into which grain can be turned by some process or other. The use of the Tamil word "Danyam" (தான்யம்) in the translation of the notification as the equivalent of " grain " strengthens the respondent's case. A trader who sells rice may be called a grain merchant and his merchandise may in a loose sense be called grain, when it includes both grain and rice; but rice is strictly not grain, and the separate entity of the grains by a process of disintegration disappears when they are converted into broken rice. For these reasons, I consider that there is no occasion to interfere with the District Munsif's decree. The Civil Revision Petition is dismissed with costs.

There is no substance in the objection taken in the memorandum of cross objections, that the notification was not published full sixty days before it was enforced as required by S. 249 of the Act. There was evidence before the Court that the Gazette notice must have been published on January 30th to come into force on April 1st, and the District Munsif accept-

1. (1896) A C 457.

ed that evidence. The memorandum of objections is dismissed with costs.

Madhavan Nair, J.:—I agree. The main question for decision in this Civil Revision Petition is whether "rice", *i. e.*, paddy without husk, and "broken rice" come within the meaning of the term "grain" found in cl. (*o*) of Sch. V of the District Municipalities Act. In the course of the argument we have been referred to well-known English Dictionaries, such as, Murray's Oxford Dictionary, Chamber's Twentieth Century Dictionary, Webster's Dictionary, etc., wherein the word "grain" has been explained. According to Murray's Dictionary the word "grain" is derived from the root ***granum*** which means 'seed'. From this, the inference is sought to be drawn that an article to be called "grain" should have the power to germinate or sprout and since this power is absent in rice which is husked paddy, it is argued that rice cannot be called "grain". But I am not quite sure whether this distinction can be accepted as a safe test because it involves the assumption that the presence or absence of "husk" is the main determining factor in the matter of germination, whereas, it is well known that rice contains the seed which germinates or sprouts, while the husk present in paddy merely serves to protect it from destruction during germination.

In a case under the Metage on Grain (Port of London) Act of 1872 (c. c. S. 4), the House of Lords had to consider whether maize and oats imported with a view of their being first subjected to a process of grinding or crushing before sale would be "grain brought into the Port of London for sale" within the meaning of S. 4 of the Act. By S. 2 of that Act "grain" is defined to mean "corn, pulse and seeds, except the following seeds when brought into the Port of London in sacks or bags, that is to say, linseed, rapeseed, millet seed, etc." With reference to the argument of Mr. Dankwerts that maize and oats sold after being subjected to the process of grinding and crushing might come within the definition of "grain" contained in the Statute, Lord Herschell pointed out in his judgment that

> "If it (Legislature) had intended to include what had been always regarded and treated as manufactured articles, such as flour and meal, as distinguished from the natural products of the earth untreated except by gathering, the language would have been altogether different to that which is to be found in this Statute."

From this it may be inferred that the meaning of the term "grain" should be confined to ***natural products of the earth untreated except by gathering***. Lord Watson stated that

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"the result of that process was that substances operated upon ceased to answer the statutory description of a dutiable article." Though the decision was given with reference to the definition of the word "grain" contained in a special statute, I think the description of the term "grain" in Lord Herschell's judgment is sufficiently general and may well be used for the purposes of the present case also. Judged by this test, "rice" which is paddy subjected to the process involving the removal of husk, and "broken rice" cannot strictly be called "grain". Mr. Sitarama Rao for the petitioner invited our attention to the definition of the word "grain" contained in S. 456 of the Merchants Shipping Act, 57 and 58 Vic., Ch. 60. That section defines "grain" to mean any corn, rice, paddy, pulse, seed, etc. But the section itself makes it clear that this is a special definition applicable to provisions of that part of the Act specially dealing with the "carriage of Grain Cargo." Obviously, this definition cannot be of much help in deciding the present case.

Under S. 249 of the District Municipalities Act, Act V of 1920,

> "The Council may publish a notification in the District Gazette and by beat of drum that no place within the Municipal limits or at a distance within three miles of such limits shall be used for any one or more of the purposes specified in Sch. V without the Chairman's licence and except in accordance with the condition specified therein."

S. 328 states that—

> "Every notification under this Act shall be published in the Official Gazette of the District in which the Municipality is situated both in English and in a vernacular language of the district."

That the Legislature never intended to include "rice" and "broken rice" within the meaning of the term "grain" appears to be clear from the fact that in the notification in Tamil published by the Municipality in pursuance of the above provisions of the Act, the word "தான்யம்" (dhanyam) is used as the Tamil equivalent of the English word "grain"; "dhanyam" as generally understood in the Tamil language does not mean "rice" (*see* Winslow's Dictionary).

For the above reasons, I am inclined to hold that "rice" and "broken rice" do not come within the meaning of the term "grain" in cl. (*o*) to Sch. V of the District Municipalities Act. The decision of the District Munsif is right and the Civil Revision Petition should be dismissed with costs.

I agree that the memorandum of objections should also be dismissed with costs.

T. S. V. *Revision petition and Memorandum of objections dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—MR. JUSTICE VENKATASUBBA RAO.

Karuppanna Tevar ... *Petitioner** *(Plaintiff)*

v.

Angammal and others ... *Respondents* *(Defts.)*.

Court Fees Act, S. 7 (4) (d); Art. 17 (b)—Applicability—Reversioner—Suit by, (1) for declaration of invalidity of alienation made by widow, and (2) for appointment of a Receiver on ground of waste by her—Court-fee payable in case of—Facts relating to waste different from alienation impeached—Court-fee—Order as to—Revision against.

In a suit by the reversionary heir of a deceased Hindu, the plaint asked for two reliefs (1) a declaration that an alienation made by the 1st defendant, the widow of the deceased, and specifically mentioned in the plaint, was not binding upon the plaintiff, and (2) the appointment of a Receiver to take possession of the estate from the widow and manage it during her lifetime. The question was, what was the Court-fee payable; in other words, whether S. 7 (4) (*c*) of the Court Fees Act or Art. 17 (*b*) of Sch. II thereof was applicable to the case.

The claim to the appointment of a Receiver was rested not upon the specific alienation sought to be impeached but on entirely different facts.

Held, that the relief for the appointment of a Receiver was not "consequential" upon the relief sought as to the alienation within the meaning of S. 7 (4) (*c*) of the Court Fees Act and that cl. (*c*) had therefore no application to the case.

Held further, that the proper Court-fee in the case was the aggregate of two sums of Rs 100 made up thus:

(1) Under Sch. I, 17 (*a*) 1, Rs. 100 for declaration; and (2) under Sch. II, 17 (*b*) Rs. 100 for Receiver.

Held also, that a revision petition lay against an order deciding the question as to the proper Court-fee payable in a case.

Petition under S. 115 of Act V of 1908 and S. 107 of the Government of India Act praying the High Court to revise the order of the Court of the Subordinate Judge of Tuticorin dated 21st September, 1925 in O. S. No. 15 of 1925.

T. Krishna Kurup for petitioner.

R. Krishnaswami Aiyangar for respondents.

The Court delivered the following

JUDGMENT:—The question to be decided in this case is, what is the Court-fee payable? Is S. 7 (4) (*c*) of the Court Fees Act or Art. 17 (*b*) of Sch. II applicable? The plaintiff who claims to be the reversionary heir of a certain deceased Hindu has filed the suit questioning an alienation made by the 1st defendant, the latter's widow, and making various charges

*C R P No. 973 of 1925. 25th January, 1926.

Karuppanna Tevar v. Angammal

regarding alleged waste by her of the property. The plaintiff asks substantially for two reliefs (1) for a declaration that an alienation specifically mentioned in the plaint is not binding upon him, and (2) for the appointment of a Receiver to take possession of the estate from the widow and manage it during her lifetime. The short question to be decided is, is the relief for the appointment of a Receiver a "consequential relief" within the meaning of S. 7 (4) (*c*)? The words used in that section are "to obtain a declaratory decree or order, where consequential relief is prayed." Does the second relief follow as a consequence from the first? I must now turn to the plaint to examine the allegations made in this respect. The plaintiff first states that the widow made a certain alienation and he impeaches it. He then proceeds to say that the widow has been wasting the estate in the following manner: by allowing debts to become barred by limitation, by making gifts of certain items of property and by executing fraudulent receipts in respect of payments not really made to her. For the purpose of ascertaining the Court-fee payable we must have regard to the allegations in the plaint. Whether they have or have not been denied in the written statement, is not a matter which signifies. In order to determine whether the first relief is consequential upon the second, let me see how the position stands. Supposing the first relief is not granted, does it follow that the plaintiff cannot obtain the second relief? The Court may hold that the alienation impeached is good, but if it comes to the conclusion that the widow has been guilty of the other acts alleged, it may appoint a Receiver. Then again take the converse case. Supposing the Court comes to the conclusion that the alienation is not binding on the estate, does it follow that the second relief will be granted? It clearly does not, because the Court may find that the particular alienation is bad but that there has not been such waste as to justify the appointment of a Receiver. As a matter of fact, there is no necessary connection between the two reliefs. It is quite conceivable of course that the plaint may be so drafted that both the reliefs may be claimed on the strength of the same set of facts. In that case the second relief may properly be said to be consequential upon the first. In the present case, however, the facts are entirely different and as I have shown the two reliefs asked for are independent of each other.. No case binding upon me which takes a different view has been cited and I hold that the proper Court-fee is the aggregate of two sums of Rs. 100 made up thus:

1. Under Sch. I, cl. 17 (*a*) 1, Rs. 100 for declaration, and

2. Under Sch. II, cl. 17 (*b*), Rs. 100 for Receiver.

The plaintiff has paid Rs. 200 and I declare that the proper Court-fee has been paid upon the plaint.

A preliminary objection has been taken that the order before me is in the nature of an interlocutory order and no revision petition will therefore lie. This contention is unsound, and this Court has often (and I have myself) interfered in revision with orders of this kind. If authority is needed I may refer to *Ramrup Das* v. *Mohunt Shiyaram Das* (1) and on this point I am prepared to follow also the decision in *Dodda Sannekappa* v. *Sakravva* (2).

The Civil Revision Petition is allowed with costs.

A. S. V. *Petition allowed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—MR. JUSTICE DEVADOSS AND MR. JUSTICE WALLER.

K. Dasa Naicken and another ... *Appellants* (*Respondents in S. A. No.* 860 *of* 1921 *on the file of the High Court —defendants*)

v.

Pulikalath Kunha Ahamad Koya and another ... *Respondents* (*Appellants in S. A. No.* 860 *of* 1921 *on the file of the High Court— plaintiffs*).

Mahomedan Law—Gift—Validity—Tarwad—Deed creating a, and giving property to a woman and her children to be held as tarwad property—What amounts to—Validity—Moplahs of Calicut—Law governing.

Parties, who were Mahomedans and were governed by the ordinary Mahomedan Law, executed a gift-deed, the relevant portion of which was as follows:

"As it is you, our mother that have brought us up, we have given to you on *Ockara Udama*, gift of proprietary right as tarwad property, the schedule-mentioned moveable and immoveable properties. Therefore we have executed this deed to you with our free will and consent granting the said properties to be occupied as tarwad property for ever by children existing now and by those who will be born to them by the aforesaid Avarankutti, Aullakoya and Ummar '(brothers of the donors)' and their children ... .The seniormost male member being the manager at the res-

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*L P A No. 100 of 1924. 20th November, 1925.

1. (1910) 14 C W N 932. 2. (1916) 36 I C 831.

Dasa Naicken v. Pullkalath Kunha Ahamad Koya.

pective times and the rest are to abide by his orders. It is hereby agreed that these properties which are set apart as tarwad property should never be partitioned or sold or mortgaged and that if any such thing is done it will not be valid........Kulichit (rent agreement) in respect of the above mentioned shops should be obtained in the name of the seniormost female members at the respective times."

Held that, on the right construction of the deed, the intention of the donors was to create a tarwad consisting of their mother and her children and that the tarwad should have all the incidents of a Malabar Marumakkathayam tarwad, and that, as the creation of such a tarwad was opposed to the ordinary Mahomedan Law, the gift was invalid.

The North Malabar Moplahs follow the Marumakkathayam Law. But such a custom does not obtain among Moplahs of Calicut. They are governed by the ordinary Mahomedan Law and are not entitled to make a gift of property to a woman and her children to be held as tarwad property.

Appeal under cl. 15 of the Letters Patent against the judgment of the Hon'ble Mr. Justice Krishnan in S.A.No.860 of 1921 on the file of the High Court, preferred against the decree of the Court of the Subordinate Judge of South Malabar at Calicut in A. S. No. 56 of 1920 presented against the decree of the Court of the Principal District Munsif of Calicut in O. S. No. 4 of 1917.

K. P. M. Menon for appellants.

K. P. Ramakrishna Aiyar for respondents.

The judgment of the Court was delivered by

Devadoss, J.

DEVADOSS, J.:—The only question in this Letters Patent Appeal is whether Ex. DD, gift deed dated the 7th September, 1884 is valid. Mr. Justice Krishnan held that the donor purported to create an estate unknown to Muhammadan Law and therefore the gift failed. The relevant portion of the document is as follows:—

"As it is you, our mother that have brought us up, we have given to you on *Ochara Udama*, gift of proprietary right as tarwad property, the schedule-mentioned moveable and immoveable properties. Therefore we have executed this deed to you with our free will and consent granting the said properties to be occupied as tarwad property for ever by children existing now and by those who will be born to them by the aforesaid Avarankutti, Aullakoya and Ummar and their children."

The donors made a gift of their property to their mother and to their three brothers to be enjoyed by them as a tarwad. It is admitted before us that the word used is 'children' and therefore the contention that was raised before Mr. Justice Krishnan that only the sons and their sons were entitled to be benefited by the gift has been given up. The question is whether a Muhammadan who is governed by the ordinary Muhammadan Law can create, by a deed, a tarwad with the incidents of

a Malabar tarwad. The clause in the Will makes a gift of the property to the mother as a tarwad property and provides that it should be occupied as tarwad property for ever by "the children existing now and by those that will be born hereafter." The document contains also the following recitals :

> "The seniormost male member being the manager at the respective times and the rest are to abide by his orders. It is hereby agreed that these properties which are set apart as tarwad property should never be partitioned or sold or mortgaged and that if any such thing is done it will not be valid."
>
> "Kulichit (rent agreement) in respect of the above mentioned shops should be obtained in the name of the seniormost female members at the respective times."

From these clauses it is quite clear that the intention of the donors was to create a tarwad consisting of their mother and her children and that the tarwad should have all the incidents of a Malabar Marumakkathayam tarwad. The parties are Muhammadans and under the Muhammadan Law a gift to a person enures for his benefit and the creation of a tarwad with all the incidents of a Marumakkathayam tarwad is opposed to the ordinary Muhammadan Law. But in the case of the Moplahs of North Malabar the Customary Law by which property could be held by a tarwad applies to them. In other words, the North Malabar Moplahs follow the Marumakkathayam Law. But such a custom does not obtain among Moplahs of Calicut and they are governed by the ordinary Muhammadan Law and are not entitled to make a gift of property to a woman and her children to be held as tarwad property. That devolution of property under a bequest or gift which is repugnant to the personal law of the testator or donor is invalid, as was held in the well-known Tagore case.

The contention of Mr. K. P. M. Menon is, that the clause providing for restraint on alienations and other clauses should not be considered in construing the clauses by which the gift was made and that the gift being to the mother and her children they have acquired a right to the property as ordinary donees. But this argument overlooks the fact that it was the intention of the donors that the property should be enjoyed by the mother and her children as tarwad property. We cannot dissociate the intention that the property should be enjoyed as tarwad property from the intention to make a gift. In other words the clauses relating to the gift should be read as a whole and the Court would not be justified in treating the gift which was intended for the benefit of the tarwad as a gift to persons, individually.

Dasa Naicken v. Pulikalath Kunha Ahamad Koya.

Devadoss, J.

If it is treated as a gift to the mother and sons, then they would take as joint tenants but the intention of the donors was not that they should take the property as free gift to them but should hold it as members of a tarwad without right of alienation so that their children and their children's children may be benefited. There are cases where bequests were made with conditions superadded with regard to alienation, and it was held that such subsequent conditions would not invalidate the gift. But where the gift itself is hemmed in by limitations and if the limitations are not those sanctioned by law then the gift must fail. The observations of their Lordships of the Privy Council in *Shookmoy Chandra Das* v. *Manohari Dassi* (1) apply to the provisions of this gift "it is true the bequest had been of rents and profits and it appeared that it was the intention of the testator to pass the estate, those words would be sufficient to do it, but what their Lordships have to do is to find the intention looking at the whole of the provisions of the Will, and they gather from those words that it was his intention to pass the estate. The provision afterwards against alienation further confirms this. It is not a case where the testator has expressed an intention to pass the estate and has added a clause against alienation, in which case the clause against alienation would be void but the provision here against alienation is confirmatory of the other part of the Will."

It has been contended by Mr. K. P. M. Menon for the appellants that the word 'tarwad' is not used in the ordinary sense. It is difficult to follow this argument in the light of the recitals in the documents. The word 'tarwad' is not only used in more places than one but the restraint on alienation and the recital that " the Kulichit agreement in respect of the abovementioned shops should be obtained in the names of the seniormost female members at the respective times" clearly indicate that the donors intended by the word 'tarwad' an ordinary Marumakkathayam tarwad.

The donors intended to create by the gift-deed a tarwad which a Moplah governed by the ordinary Muhammadan Law is not entitled to do. In this view of the document it is unnecessary to consider whether a custom prevails among the Calicut Muhammadans by which property should be enjoyed by them as tarwad property. The mere fact that they adopt the customs of their neighbours, the Nairs, is no ground for holding that they are governed by a valid custom by which property

1. (1885) L R 12 I A 103: I L R 11 C 684 at 692 (P C).

Dasa Naicken v. Pulikalath Kunha Ahamad Koya.

Devadoss, J.

could be held as tarwad property. The Moplahs of South Malabar are not governed by the Marumakkathayam Law or the Aliyasanthana Law of inheritance but are governed by the ordinary Muhammadan Law.

We therefore hold that the clause in the deed of gift creates an estate repugnant to the Muhammadan Law and therefore invalid. The judgment of the learned Judge is right and the Letters Patent Appeal is dismissed with costs.

A. S. V. *Appeal dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.*

PRESENT :—MR. JUSTICE RAMESAM AND MR. JUSTICE VENKATASUBBA RAO.

Aukula Sanyasi ... *Appellant** (*1st Defendant*)

v.

Gundala Ramachandra Rao and others... *Respondents (Plaintiffs and defendants Nos. 4 and 5 and L. R. of 5th defendant, deceased).*

Aukula Sanyasi v. Ramachandra Rao.

Hindu Law—Widow—Decree against—Sale in execution of—Interest passing under, property itself or widow's interest therein—Sale proclamation—Reference to—Permissibility—Conditions—Alienation ancient by widow—Necessity for—Presumption in favour of—Conditions—Applicability of presumption to a particular case—Question as to—Fact or law—Decision of Court below on that point—Interference in Second Appeal with—Conditions—Documentary evidence—Misconstruction of a piece of—When a ground for interfering with a finding of fact in Second Appeal.

Property held by a Hindu widow as heiress of her father was sold in execution of a decree obtained on foot of a mortgage executed by her. The question was whether the execution sale passed the entire property or only the widow's life-interest therein. In the last column of the sale proclamation there was a statement that the debt was one for discharging all the debts contracted by defendant's (widow's) father for family expenses and for defendant's maintenance and that the whole right of the defendant was to be sold in auction. No evidence was, however, adduced to show that the debt for which the property was sold was binding on the estate. It was contended that on the construction of the sale proclamation it must be held that the whole property passed.

Held, that, where the evidence that the debt was binding on the estate was wanting and the proceedings in the suit did not show that the widow represented the estate so as to attract the application of *res judicata* in a subsequent case, it was not permissible merely by reference to the proclamation to say that the whole property passed though it had not been shown that there was necessity.

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*S A. No. 1559 of 1922. 2nd February, 1926.

Aukula Sanyasi v. Ramachandra Rao.

In cases where an alienation by a Hindu widow is impeached after a long lapse of time and where the recitals raise a suspicion that the transaction was for a proper purpose, or at any rate such purpose was represented to the purchaser, Courts ought to apply the principles of the decisions in *Bangachandra Dhur Biswas* v. *Jagat Kishore Acharjya Chowdhuri*, (1916) I L R 44 C 186, *Venkata Reddi* v. *Wadhwan*, (1919) I L R 43 M 541: 38 M L J 393 (P C) and *Somayya* v. *Venkayya*, (1924) 48 M L J 224 as far as possible to uphold the sale. But it does not follow from these decisions that all ancient transactions ought to be upheld; where the circumstances tend the other way it will be reasonable not to apply those decisions.

Error in construing a piece of the documentary evidence in a case is no ground for interfering in Second Appeal with a finding of fact unless that error has prejudiced the appellant in the rest of the judgment. Whether the principle of the decisions in *Bangachandra Dhur Biswas* v. *Jagat Kishore Acharjya Chowdhuri*, (1916) I L R 44 C 186, *Venkata Reddi* v. *Wadhwan*, (1919) I L R 43 M 541: 38 M L J 393 (P C) and *Somayya* v. *Venkayya*, (1924) 48 M L J 224 is applicable in a particular case is a question of fact; and unless there is some error of law in the conclusion of the Lower Court on that point the High Court will not in Second Appeal interfere with the same.

Second Appeal against the decree of the Court of the Additional Subordinate Judge of Vizagapatam in A. S. No. 115 of 1922 (A. S. No. 337 of 1920 on the file of the District Court of Vizagapatam—A. S. No. 186 of 1920 on the file of the Court of the Subordinate Judge of Vizagapatam) preferred against the decree of the Court of the District Munsif of Vizianagram in O. S. No. 28 of 1918.

V. Govindarajachari for appellant.

T. R. Ramachandra Aiyar and *Y. Suryanarayana* for respondents.

The Court delivered the following

Ramesam, J.

JUDGMENTS :—*Ramesam, J.* :—The facts of this Second Appeal may be stated as follows : One Gundala Jagannadha Row died some time before 1859. He was succeeded by his daughter Sitamma. He had a brother Gundala Venkataramadas who had died before him and left a widow, Venkamma. In 1862 there was some dispute between these two ladies which resulted in a suit and a compromise. Ex. I evidences the settlement of that suit. According to this compromise Sitamma was to get two-thirds of all properties including the debts due to the estate and bear two-thirds of the liabilities of the estate and Venkamma was to get the other one-third share. In 1882 Sitamma mortgaged the suit property to one Mokka Sanyasamma. It purported to be for discharging a prior debt due by her to one Kamma Appadu. The purpose of the debt to Kamma Appadu was not stated. In 1888 the mortgagee

Aukula Sanyasi v. Ramachandra Rao.

Ramesam, J.

brought a suit against Sitamma on the basis of Ex. II and obtained a decree. The defendant did not appear in that suit. Ex. III is the decree. While execution was being taken out Kodanda Rao, 1st plaintiff's father, claiming as reversioner, filed a claim petition under S. 278, Civil Procedure Code, alleging that Sitamma, being possessed of lands fetching a net kist of about Rs. 100 a year, had no necessity to incur debts binding on the estate and praying that the life-interest only of the widow may be sold. The District Munsif without going into the claim petition dismissed it on the ground that the sale proclamation had already been settled. This proclamation is not forthcoming. The property was ultimately sold only in 1892. In the last column of the sale proclamation of 1892 there was a statement that the debt was one for discharging all the debts contracted by defendant's father for family expenses and for defendant's maintenance and that the whole right of the defendant was to be sold in auction. The present suit has been filed by the reversioners in January, 1918 for recovery of the property sold in 1892.

Meanwhile the property was purchased by the decree-holder in the auction and was afterwards sold to the present defendant by a sale-deed, Ex. VII, dated the 9th of April, 1913. The fourth issue in the case is:

"Was the mortgage made for legal necessity, and are the sales in execution binding on the estate?"

The District Munsif found on this issue in favour of the plaintiffs and decreed the suit. On appeal the Subordinate Judge confirmed the decision of the District Munsif. The 1st defendant files this Second Appeal.

It has been argued by Mr. Govindarajachari for the appellant that on the construction of the proclamation it should be held that the whole property passed. If there is a finding that the debt was binding on the estate, then it is the most proper construction of the proceedings in the suit and execution that the whole property was intended to pass to the purchaser, and I think this is the effect of *Veerabadra Aiyar* v. *Marudaga Nachiar* (1) and *Rameswar Mandal* v. *Provabati Debi* (2). But where the evidence that the debt is binding on the estate is wanting and where the proceedings in the suit do not show that the widow represented the estate so as to attract the application of *res judicata* in a subsequent case, I do not think it is

1. (1910) I L R 34 M 188: 21 M L J 320.

2. (1914) 20 C L J 23.

Aukula Sanyasi v. Rama-chandra Rao.
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Ramesam, J.

permissible merely by reference to the proclamation to say that the whole property has passed though it has not been shown that there was necessity. I do not think that such a proposition of law has ever been laid down. In this case the proclamation was drafted after the claim petition and is therefore suspicious.

The next and most important contention raised in the case is that the finding of the Subordinate Judge is vitiated by various defects. First, it is said that he has not properly applied the principle of the two Privy Council decisions *Bangachandra Dhur Biswas* v. *Jagat Kishore Acharjya Chowdhuri* (3) and *Venkata Reddi* v. *Wadhwan* (4). In these two cases the Privy Council have laid down that in cases where sales by widows have been questioned after long lapse of time the recitals in the document ought not to be disregarded even though they are not strictly evidence. In *Bangachandra Dhur Biswas* v. *Jagat Kishore Acharjya Chowdhuri* (3) it is pointed out :

> "As time goes by, and all the original parties to the transaction and all those who could have given evidence on the relevant points have grown old or passed away, a recital consistent with the probability and circumstances of the case assumes greater importance, and cannot lightly be set aside: for it should be remembered that the actual proof of the necessity which justified the deed is not essential to establish its validity. It is only necessary that a representation should have been made to the purchaser that such necessity existed, and that he should have acted honestly and made proper enquiry to satisfy himself of its truth. The recital is clear evidence of the representation, and if the circumstances are such as to justify a reasonable belief that an enquiry would have confirmed its truth, then when proof of actual enquiry has become impossible, the recital, coupled with such circumstances, would be sufficient evidence to support the deed."

The same principle has been practically followed by this Court in *Venkata Reddi* v. *Wadhwan* (4), the decision being confirmed by the Privy Council in a short judgment. My learned brother in *Somayya* v. *Venkayya* (5) has explained these decisions and reaffirmed their principles. He says:

> "In this respect again, Courts do not insist upon strict proof and if the circumstances are such as to justify an inference that an enquiry was made, the Courts will hold without rigid proof that an enquiry was actually made. This is the general rule and the omission of full details may be made good by presumptions at whatever point the proof is wanting. It is difficult to lay down any hard and fast rule. A sound exercise of judicial discretion is the only safe guide."

3. (1916) I L R 44 C 186: 31 M L J 563 (P C).
4. (1919) I L R 43 M 541: 38 M L J 393 (P C).
5. (1924) 48 M L J 424.

Aukula Sanyasi v. Ramachandra Rao.

Ramesam, J.

I entirely agree with these remarks. In cases where there is a long lapse of time and where the recitals raise a suspicion that the transaction was for a proper purpose, or at any rate such purpose was represented to the purchaser, Courts ought to apply the principles of these three decisions as far as possible to uphold the sale. But it does not follow from these decisions that all ancient transactions ought to be upheld; where the circumstances tend the other way it will be reasonable not to apply these decisions.

In the present case, Ex. II, the mortgage deed of 1882 does not mention the purpose for which the prior debt in favour of K. Appadu was contracted. It shows that the document in favour of Appadu was also handed over to the mortgagee and the mortgagee handed over all the records connected with the purchase to the present defendant along with the sale-deed, Ex. VII. But that document has not been produced. This rather goes against the defendant.

Then again it is said that the Subordinate Judge committed a serious mistake in construing Ex. VIII. It is a sale-deed by Sitamma in 1879 of another of her properties. That document recites that it was made for the purpose of discharging a prior mortgage deed executed by her which was itself contracted for the purpose of discharging her two-third share of her father's debt. The Subordinate Judge says that this document shows that all the family debts were wiped out. In this he is undoubtedly wrong, and if we think that this error has prejudiced the appellant in the rest of the judgment we should in strictness call for a finding. But we do not think that this error in construing Ex. VIII has any bearing on the rest of the judgment. It is true that Ex. VIII does not show that all the debts were wiped out; but a perusal of Ex. I shows that they were all debts due on usufructuary mortgages or deeds of conditional sale. It was open to Sitamma to redeem them if she liked, and if she borrowed for the purpose of redeeming, the debts would be binding on the reversioners. There is nothing to connect the debt of Appadu with any one of such debts. The contract between the recitals in Ex. II and the recitals in Ex. VIII also goes against the appellant. The interval in this case between the transaction and the suit is 36 years. It is true that it is not so much as in the two Privy Council cases or *Somayya v. Venkayya* (5). It is impossible to lay down any hard and fast rule as to the length

5. (1924) 48 M L J 224.

Aukula Sanyasi v. Ramachandra Rao.

Ramesan, J.

of time. Each case must depend on its own facts. All that we can now say is, on the facts of this case it is impossible to say that the Subordinate Judge has committed any error of law or has even acted perversely in refusing to apply the principle of the two Privy Council cases. Whether this principle is applicable in a particular case is certainly a question of fact. However much we may set aside the Lower Court's judgment in first appeal, we cannot do so in second appeal unless there is some error of law. In a case reported in the Law Times I refused to interfere in second appeal where the Subordinate Judge applied the principle of these cases though I was inclined to differ from the Subordinate Judge, while expressing my inability to set aside his judgment.

On these grounds the second appeal fails and is dismissed with costs.

Venkatasubba Rao, J.

Venkatasubba Rao, J.:—I agree and I would like to add a few words. The mortgagee under Ex. III filed a suit and obtained a decree. The first question to be determined is, whether Sitamma in this suit represented the estate of her father? The mere fact that the mortgage suit arose out of her own acts would not prevent her from representing that estate [*see* my judgment in *Pothukuchi Rajagopalan and others* v. *Valivety Ramamurthi and others* (6)]. As I have said in that judgment, whether the limited owner represented the inheritance must be gathered from the nature of the suit and the defence put forward, the issues tried and raised and decided in that former suit. Unfortunately we have not before us the materials which will help us in the decision of this question. The appellant has not shown by referring us to the necessary records, that what passed at the Court sale held in execution of the mortgage decree was the entire estate and not merely the daughter's interest.

This makes the decision of the second question necessary, namely, whether the debt incurred by Sitamma was for purposes binding upon the reversion? When the transaction impeached happened long while ago, it is undoubtedly true that the alienee is entitled to ask the Court to have regard to this fact when estimating the value of oral evidence or making inferences from circumstances. It is equally true that the alienee, when oral evidence is wanting, can rely on circumstances which, however feeble, may yet point to the truth of his case. After the lapse of a long time, the alienee always

6. C M A No. 35 of 1922.

happens to be in a difficult position and this is more especially the case when the party in possession (as in the present case) happens to be a stranger to the original transaction and there have been intervening alienations. It is but reasonable and just that one should not unduly strain a point against an innocent purchaser tracing his ultimate source of title to a distant alienation like the one before us. The point however remains, whether the learned Subordinate Judge has failed to properly direct his mind to the various factors which have a bearing upon the issue. I am not prepared to say that his decision is wrong in the sense that I can interfere with it in Second Appeal.

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Venkatasubba Rao, J.

I agree therefore that this appeal fails and should be dismissed with costs.

A. S. V. *Appeal dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—MR. JUSTICE PHILLIPS AND MR. JUSTICE MADHAVAN NAIR.

Polepeddi Krishnamoorthy (minor) by next fried Yanamandram Krishnayya ... *Petitioner** (*Petitioner*)

v.

Polepeddi Ramayya and others... *Respondents* (*Respondents*)

Krishnamoorthy v. Ramayya.

Civil Procedure Code, O. 33, Rr. 5 (a) and 15—Scope of—Summary rejection of pauper application—Fresh application if barred.

Where an application to sue in *forma pauperis* is summarily rejected under O. 33, R. 5 (*a*), Civil Procedure Code, a second application to sue as a pauper is not barred by the provisions of O. 33, R. 15. *Chinnammal* v. *Papathi Ammal*, 85 I C 982 followed.

The principle underlying O. 33, R. 15 explained.

Petition under S. 115 of Act V of 1908 praying the High Court to revise the order of the Court of the District Munsif of Tirupati dated 31st March, 1924 and passed in O.P. No.25 of 1923.

B. C. Seshachala Aiyar and *B. C. Sankaranarayana* for petitioner.

M. Renganadha Aiyar for *N. Chandrasekara Aiyar* for respondents.

The Court delivered the following

JUDGMENTS :—*Phillips, J.* :—The question for decision is whether, when an application to sue in *forma pauperis* is re-

Phillips, J.

*C. R. P. No. 655 of 1924. 24th February, 1926.

Krishnamoorthy v. Ramayya.

Phillips, J.

jected under O. 33, R. 5 (*a*), a second application is barred by the provisions of R. 15 of that order? The Calcutta High Court in *Atul Chandra Sen* v. *Peary Mohan Mukerjee* (1) held that there is no distinction between orders of rejection passed under R. 5 and orders of refusal passed under R. 7 and this view has been adopted in *Ali Afzal* v. *Purna Chandra* (2). There is also a case in *Ranchod Morar* v. *Bezanji Edulji* (3), where a similar view appears to have prevailed.

On the contrary, we have the authority of the Lahore High Court in *Bal Kuar* v. *Shib Das* (4) and of a Full Bench of the Burma Chief Court in *Howa* v. *Sit Shein* (5) that a distinction should be made between these two class of orders. They have held accordingly that an order passed summarily under R. 5 (*a*) is not a bar to a second application. The leading case is the one in *Atul Chandra Sen* v. *Peary Mohan Mukerjee* (1) which distinctly holds that there is no distinction between orders under R. 5 and orders under R. 7. No reason is given for coming to this conclusion; and, as pointed out by the Burma Chief Court, there is at least a verbal difference between these two orders. I am inclined to think that there is more than a verbal difference. The orders are different in kind. Under R. 5 the Court rejects an application summarily and without enquiry, whereas under R. 7 an order is passed after due enquiry into the merits of the application. The principle underlying R. 15 appears to be that of *res judicata*, viz., that the Court will not entertain a second application when the first has been dismissed on the ground that the petitioner is not entitled to sue as a pauper. Any order passed under R. 5 (*a*) is of a summary nature based on the petition itself or on facts which are apparent at the time of presentation of the petition. For instance, if the petition does not contain a schedule of property or if it is presented by the alleged pauper's agent, it has to be rejected, and if we are to apply the ruling of the Calcutta High Court, it can never be represented. This goes a good deal further than the principle of *res judicata* for it gives the force of *res judicata* to a summary order passed without enquiry or contest and consequently, I think it is doubtful whether that is the intention of the legislature. It is noticeable that R. 15 refers to an order "refusing to allow an applicant to sue as a pauper" and these words are the identical words used in R. 7,

1. (1915) 20 C W N 669.
2. (1924) 40 C L J 188.
3. (1894) I L R 20 B 86.
4. (1919) 56 I C 207.
5. (1917) 42 I C 803 (F B).

Krishnamoorthy v. Ramayya. Phillips, J.

cl. (3) and it is clear that R. 15 applies to such an order. I can see no reason for extending it to include an order rejecting an application when such order does not either in terms, or by implication, refuse to allow an applicant to sue as a pauper. For instance, the rejection and return of a petition presented by an agent can hardly be said to amount to a refusal to allow the petitioner to sue as a pauper for there is no provision specifically prohibiting its representation by the pauper himself. In the present case the order rejecting the application is very specific. The District Munsif states that he has to reject the petition but that he ought not to be understood as expressing any opinion on the question whether the plaintiff is a pauper or not, and there is clearly no adjudication on the merits by this order. I am therefore of opinion that such an order is not a bar to the subsequent presentation of a petition based on the same right to sue. This view was adopted by my learned brother in *Chinnammal* v. *Papathi Ammal* (6) which was a case where the first petition had been dismissed for default. I would therefore hold that when there has been no enquiry under R. 6 and a consequent order under R. 7 the order rejecting the application is not a bar to a second application.

I may mention here that both in *Ranchod Morar* v. *Bezanji Edulji* (3) and *Atul Chandra Sen* v. *Peary Mohan Mukerjee* (1) there had been an enquiry under R. 6 although the Court purported to pass an order under R. 5.

I would therefore allow the petition and remand the case for disposal on the merits. The respondent will pay the petitioner's costs.

Madhavan Nair, J.

Madhavan Nair, J.:—I entirely agree. In my judgment in *Chinnammal* v. *Papathi Ammal* (6) I have indicated the view that O. 33, R. 15, Civil Procedure Code, contemplates an enquiry and dismissal of "the application to sue as a pauper" on the merits. Since that has not taken place in this case the present application is not barred under the provisions of that order. It must therefore be disposed of on the merits.

T. S. V. *Revision Petition allowed and case remanded.*

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1. (1915) 20 C W N 669.
3. (1894) I L R 20 Bom 86.
6. (1924) 85 I C 982.

PRIVY COUNCIL.

[On Appeal from the High Court of Judicature at Patna.]

PRESENT :—VISCOUNT DUNEDIN, LORD BLANESBURGH, SIR JOHN EDGE AND MR. AMEER ALI.

Ganesh Lal Pandit and others ... *Appellants**

v.

Khetramohan Mahapatra and others ... *Respondents.*

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Ganesh Lal Pandit *v.* Khetra-mohan Mahapatra.

Hindu Law (Mitakshara school)—Alienation by widow—Registration Act (III of 1877), S. 32—Conveyance executed by attorney—Power-of-attorney registered six days later—Limitation Act (XV of 1877), Sch. II, Art. 66—Mortgage containing covenant for repayment of debt within six months—Suit upon covenant brought ten years after date repayment due—Conveyance in satisfaction of decree thereon—Seizure of deceased's estate in execution of decree for contribution for Government revenue arrears—Conveyance in consideration of release.

On the 23rd July, 1884, a Hindu widow, governed by the Mitakshara Law, mortgaged some of her deceased husband's property for Rs. 33,500, with a covenant for the repayment of the same with interest at the rate of 1 per cent. per mensem within six months. The loan was not repaid, and in 1896, the mortgagee brought an action for enforcement of the mortgage. He obtained an *ex parte* decree for Rs. 80,000 odd, which was executed by an auction-sale of the property, the mortgagee himself buying it for Rs. 33,000. For the balance of the judgment-debt, the widow made a compromise, and later, in pursuance thereof executed conveyances of other properties of the deceased to the mortgagee.

Also on 29th July, 1884, another conveyance of the deceased's lands in favour of the aforesaid mortgagee was executed. It purported to have been executed on her behalf by an attorney whose power-of-attorney appeared to have been registered under the Registration Act, 1877, then in force, on the 29th July, 1884.

Further, in 1899, the widow having become liable for arrears of Government revenue, under Act XI of 1859 due on a mouza which she held in her husband's estate with her co-sharers, these co-sharers, to save the mouza from sale under the Act, paid the revenue, and sued her for contribution; they obtained a decree, and attached her dwelling-house in execution, in consequence whereof she again resorted to the aforesaid mortgagee, and to raise the funds necessary to release the seizure, executed another conveyance on the 25th November, 1899 in his favour.

In 1916, after the widow's death, the reversioners brought an action to set aside these conveyances. *Held,* that (*i*) the conveyance executed by the attorney on the 23rd July, 1884, was void under S. 32 of the Registration Act, 1877, he having no authority prior to the 29th July, when the power-of-attorney was apparently registered, to execute any conveyance on his principal's behalf, and the execution of the power not having been proved in the manner required by that section; (*ii*) the conveyances executed in pursuance of the compromise in 1899 were void as against the reversioners because the suit in which the decree was made terminating in the compromise was barred under the Limitation Act (XV of 1877), Sch. II, Art. 66, having been brought in 1896 upon the mortgage of the 23rd July, 1884, which became payable on the 23rd

*P C Appeal No. 96 of 1923. 23rd March, 1926.

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January, 1885, and the suit should accordingly have been brought within six years of the latter date. *Ramdin* v. *Kalka Pershad*, L R 12 I A 12 followed; *Miller* v. *Runga Nath Moulick and others*, I L R 12 Cal 389 approved; (*iii*) the conveyance of the 25th November, 1899, however, was good and valid, having been made in consideration of a compelling necessity, the release of the widow's dwelling-house from attachment, and not merely to satisfy an ordinary debt. *Upendra Lal Mukherji* v. *Girindra Nath Mukherji*, 2 C W N 425 distinguished.

Appeal from a decree (16th January, 1922) of the High Court (Das and Adami, JJ.) varying a decree (30th January, 1919) of the Subordinate Judge of Cuttack (P. Bhattacharjee, Esq.).

The facts appear from the judgment of their Lordships.

L. de Gruyther, K. C. and *B. Dube* for appellants.— The Courts below having held that the mortgage-decree of 1896 was good and valid, the conveyances executed by the widow in 1899 to discharge that decree are unassailable; those conveyances are strengthened by the compromise that followed the decree. Also, that decree was in effect a combined decree under Ss. 88 and 90 of the Transfer of Property Act, 1882, and the High Court is in error in holding that the "failure to obtain a decree under S. 90 of that Act vitiates the kabalas" in question. The High Court ought not to have allowed the plaintiffs-respondents to have argued for the first time on appeal that those conveyances were executed when (in 1899) the debts had become barred by limitation. The sale-deed of the 23rd July, 1884, was executed by the widow by the pen of her agent, *i. e.*, it was executed by herself on that date, and registered on her behalf by her agent on the 29th July, 1884. Lastly, the conveyance of the 25th November, 1899, was executed under compelling necessity, and the facts connected therewith are undisputed: *Upendra Lal Mukherji* v. *Girindra Nath Mukherji* (1) is not a case in point, as there was no seizure or attachment there, but merely an action begun.

The respondents were not represented.

23rd March, 1926. The Judgment of the Board was delivered by

Mr. Ameer Ali.

MR. AMEER ALI :—Their Lordships are relieved of the necessity of narrating at length the facts of this complicated litigation, as the judgment under appeal summarises very clearly the history of the transactions in debate.

This is an *ex parte* appeal from the judgment and decree of the High Court of Patna which partly affirmed and partly reversed the order of the Court of first instance.

1. (1898) 2 C W N 425.

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Ganesh Lal Pandit v. Khetra-mohan Mahapatra.

Mr. Ameer Ali.

A Hindu lady of the name of Suryamani, who died in 1904 or 1905, conveyed by mortgage and sale to one Behari Lal Pandit, the father of the defendant No. 1, almost the whole of the property which had devolved on her as the widow of one Banamali Mahapatra, a native of Orissa, subject to the Mitakshara Law. Banamali appears to have died in the year 1863, leaving him surviving his widow, Suryamani, and two daughters, one of whom died not long after, childless; the other Satyabhama, survived her mother, and was the original plaintiff in the present suit, which was instituted in the Court of the Subordinate Judge of Cuttack on the 17th September, 1916. Satyabhama challenged in the action the validity of the transactions entered into between Suryamani and Behari Lal Pandit in respect of the properties conveyed to him by the widow. On Satyabhama's death her sons, the present respondents, were substituted in her place.

It is not disputed that Suryamani, on coming into possession of the properties left by her husband, had to meet heavy expenses connected with the litigation in which Banamali was involved. The High Court, in its judgment, refers to the circumstances which compelled her to alienate many of the properties which formed the subject of controversy in the present case.

In respect of the others the learned Judges of the High Court, differing from the Trial Judge, have held firstly that the documents which purported to create the alienations were not properly explained to the lady, that she was an ignorant *purdanashin* woman and had no independent advice; and secondly, that some of the alienations challenged by the plaintiffs were either for debts that were barred or not binding on the reversioners. They have also held that the principal mortgage purporting to have been executed by Suryamani was not executed in compliance with the provisions of the law so as to make it binding on Suryamani.

It is with regard to these findings that the present appeal before the Board is concerned.

On the defendants' side it is alleged that on the 23rd July, 1884, Suryamani entered into two transactions with Behari Lal Pandit: one was a mortgage for Rs. 33,500, the other a sale to him of certain properties for Rs. 8,000. The sale-deed is marked in the proceedings as Ex. Q. 6, and the deed of mortgage as Ex. M.

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In 1896 Behari Lal Pandit instituted a suit against Suryamani and her daughter Satyabhama for enforcement of the mortgage. On the 28th August, 1896, Behari Lal Pandit obtained an *ex parte* decree.

Their Lordships do not think it necessary to refer to the steps taken by the ladies to set aside the *ex parte* decree; it is enough to say that they failed in those proceedings and on the 25th and 26th August, 1897, the mortgage decree was executed, and the mortgaged properties were put up for sale and purchased by Behari Lal himself for Rs. 33,000 odd. At the time of the sale the mortgage debt amounted to something like Rs. 80,000. In order to pay the balance of the mortgage debt Suryamani entered into a razinama or deed of compromise by which she agreed to transfer to Behari Lal her remaining properties in her hands belonging to the estate of her husband. In pursuance of this razinama she appears to have executed in 1899 a number of conveyances which are marked in the proceedings as O., Q. 1, Q. 2, Q. 3 and Q. 4. Q. 5 executed about the same time, stands in a different category.

As already stated Satyabhama, and after her death, the plaintiffs, as reversioners to Banamali's estate, challenged the sale-deed of the 23rd July, 1884, by which Behari Lal purchased some of the property on the 23rd July, 1884. They also challenge the mortgage deed of the same date and the transactions of 1899, evidenced by Ex. O., Q. 1, Q. 2, Q. 3, Q. 4 and Q. 5.

The learned Judges of the High Court have held that the defendants had established legal necessity in respect of the mortgage of the 23rd July, 1884, and that consequently the sale under the mortgage decree was valid, but that they had failed to satisfy that the sale of the 23rd July, 1884, Q. 6, was for justifiable necessity, or that she had in fact executed the sale-deed, or that it was read over and explained to Suryamani, and that apart from that she had no independent advice. They also held that the kabalas executed by the widow in 1899 were not binding on the reversioners.

In their Lordships' opinion the evidence fully justifies the conclusions of the learned Judges. The deed of sale (Q.6) was executed for Suryamani by a person of the name of Lakhan Mahanty, under a power of attorney which bears date the 29th of July, 1884, six days after the sale in question. The substance of the powers entrusted to Lakhan are set out in the Register of Powers of Attorney for 1884 as follows:—

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S. (1).—EXTRACT FROM THE REGISTER OF POWERS-OF-ATTORNEY FOR 1884.

(*From a Certified Copy.*)

No. of Power.	Date of Execution.	Name and addition of Principal.	Name and addition of Attorney.	Name and addition of Witnesses.	Abstract of Power.
22	29-7-84	Suryamani Dei, widow of Banamali Santra Mahapatra, of Gunadole, Pargana Sailo, Karan, Zamindar.	Lakhan Mahanty, son of Madan Mahanty, of Deuli, Pargana Kodinda, Karan, Mukhtar.	Chintamani Das, son of Bhubananda Das of Kantapada, Pargana Jhankar at present Gonadole, Pargana Sailo, Karan, Makaddami.	GENERAL POWER. To execute and register a mortgage bond of Rs. 33,500 and a deed of sale of Rs. 8,000 in favour of Babu Behari Lal Pandit.
				Dayanidhi Mahanty, son of Ram Mahanty of Samalda, Pargana Sailo, Karan, Gomasta.	Certified that there are no interlineations and blank, etc., in the body of the document. (Sd.) PURNACHANDRA RAY, *S. S. Registrar.*

It will be noticed that this power was registered on the 29th of July, whilst the sale was effected on the 23rd. Neither of the two witnesses to the execution of the power was examined. Under the Registration Act of 1877 the same provisions are made as under the Act now in force for safeguarding the interests of absent executants of documents when presented for registration by a person claiming to act by and under their alleged authority. S. 32 provides that "every document to be registered under the Act whether such a registration be compulsory or optional, shall be presented by such person executing or claiming under the same. . . . or by the representative or assignee of such person or by the agent of such person represented or assignee *duly authorised* by power of attorney duly executed and authenticated in the manner hereinafter mentioned."

Their Lordships concur with the High Court in holding that the sale-deed of the 23rd July, 1884, which purported to be executed by Lakhan Mahanty for Suryamani was not validly executed, and that the sale thereunder could not bind either Suryamani or the reversioners.

As regards the kabalas by which Suryamani purported to transfer her remaining properties to Behari Lal Pandit in discharge of the balance remaining over after the sale under the mortgage decree, their Lordships also agree with the High Court that the claim on the personal covenant for the balance of the mortgage-debt was barred by the statute of limitation (XV of 1877), long before the execution of the razinama and the conveyances thereunder. It will be noticed that the mortgage of the 23rd July, 1884, by which Suryamani borrowed Rs. 33,500 from Behari Lal Pandit on interest at the rate of 1 per cent. per mensem was repayable by her within six months from the date of the execution of the document. The covenant on her failure to repay is as follows :—

"If I fail to pay the whole of the principal and interest within the aforesaid term the creditor is competent to sue me in the Court and realise the principal with interest thereon at the rate of Re. 1 per cent. per mensem from this day till the date of realisation and costs of the suit from me and from the mortgaged properties, and, if insufficient, from my other moveable and immoveable properties."

The decree on this mortgage, Ex. T. (1), made on the 28th August, 1896, was in the following terms:—

"This suit is for recovery of the principal of Rs. 33,500-0-0 and the balance of interest of Rs. 47,228-8-0, in all Rs. 80,728-8-0 and the interest which

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will accrue from the date of institution of the suit till that of realisation and the costs of the suit from the defendant and if not fully realised from her then from the mortgage properties, except those exempted from mortgage liability at the request of the defendant No. 1 by putting them up for sale and if insufficient the balance be realised from the surety defendant No. 2 and her properties."

The suit on the mortgage bond was not instituted until ten years after the debt became repayable. The decree for the balance, if the sale of the mortgaged properties proved insufficient, was against Satyabhama, who had stood as surety on the mortgage. Satyabhama was afterwards absolved from all liability as surety in the High Court. In the case of *Ramdin* v. *Kalka Pershad* (2) it was held by the Judicial Committee that when a mortgagee sues on a personal covenant to make the mortgagor responsible for any deficiency in the realisation of the mortgage debt out of the mortgaged properties, the claim would be barred in three years. That case arose under the Limitation Act of 1871 (IX of 1871), and the same argument which has been advanced in the present case was submitted to the Board. Their Lordships in that case held as follows:—

"The second schedule places simple money demands generally under the three years' limitation, and under No. 65 the same limitation is applied to a single bond, and under the same limitation are placed bills of exchange, arrears of rent and suits by mortgagors to recover surplus from the mortgagee. The six years' limit embraced suits on foreign judgments and some compound registered securities. The twelve years' period is made applicable principally to suits in respect of immoveable property, though it also applies to judgments and recognizances in *India*. But the counsel for the appellant relied upon the language of the 132nd article of the second schedule: 'For money charged upon immoveable property, twelve years.' His contention was that that period of twelve years applied to every remedy which the instrument carried with it, and gave twelve years for the personal remedy against the mortgagor as well as against the mortgaged property."

The Judicial Committee expressly overruled the contention that a claim for the balance of the mortgage debt based on the personal covenant came under Art. 132 of Sch. II applicable to claims for money "charged on immoveable property."

That case was followed by the High Court of Calcutta in *Miller* v. *Runga Nath Moulick and others* (3) which arose under Act XV of 1877. There the learned Judges held as follows:—

"We are of opinion that the decision of the Lower Court upon the question of limitation is correct. The contention of the learned counsel for the appellant that Art. 132 of Sch. II of the Limitation Act of 1877 refers to a

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2. (1884) L R 12 I A 12: I L R 7 A 502 (P C). 3. (1885) I L R 12 C 389.

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claim to recover money charged upon immoveable property quite irrespective of the remedy asked for, has been set at rest by the decision of the Judicial Committee of the Privy Council in the case of *Ramdin* v. *Kalka Pershad* (2). That decision was passed with reference to the corresponding article of the Limitation Act of 1871. That article provides a period of twelve years for suits of money charged upon immoveable property. The Legislature in the present Limitation Act has used a different phraseology, viz., 'to enforce payment of money charged upon immoveable property'. The language of the present Act, viz., 'to *enforce*, etc.,' is more in favour of the contention that the article in question refers only to suits 'to enforce payment of money charged upon immoveable property' *by the sale of the said property.* This construction was put by the Judicial Committee of the Privy Council upon Art. 132 of the Limitation Act of 1871, the language of which did not suggest it so clearly as that of the present Limitation Act. The claim to make the defendants personally liable has therefore been rightly held to be barred by limitation, the present suit having been commenced more than six years after the accrual of the cause of action."

Art. 65 of the second Schedule (Act IX of 1871) is reproduced in Act XV of 1877 as Art. 66.

Their Lordships are of opinion that the view taken by the High Court on the question of limitation is well founded. The cause of action on the personal covenant accrued to Bepary dah Pandit when Suryamoni failed to pay the mortgage debt, viz., within six months from the date of the mortgage. And the claim had become barred under Art. 66 long before the execution of the razinama and the conveyances thereunder. Consequently it is not necessary to consider whether a decree under S. 90 of the Transfer of Property Act of 1882 is requisite in case of deficiency in the realisation from the mortgaged property. Admittedly no decree was asked for or made. S.90 is now O. XXXIV, R. 6, of the Civil Procedure Code of 1908.

As regards the consideration for Ex. Q.5, which was a conveyance executed by Suryamani in favour of Behari Lal Pandit on the 25th November, 1899, it appears that Suryamani became liable for her arrears of Government revenue under Act XI of 1859 in respect of a mouzah which she held in her husband's estate with other co-sharers. To save the property from sale under the Act the co-sharers paid the revenue due from her and sued her for contribution. They obtained a decree and attached her dwelling-house for the satisfaction of the debt. This is recited in Ex. Q.5, the kabala by which she conveyed the property now claimed by the reversioners.

The learned Judges of the High Court relying on the case of *Upendra Lal Mukherji and others* v. *Girindra Nath Mukherji and others* (1) have held that where the Hindu widow

1. (1898) 2 C W N 425. 2. (1884) L R 12 I A 12; I L R 7 A 502 (P C).

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fails to pay her share of the Government revenue and after her death her co-sharer brings a suit for contribution, the reversionary heirs of her husband's estate were not bound to satisfy the debt. But in the present case it has been found as a fact by the Subordinate Judge that the co-sharers had, in execution of their decrees for contribution, attached Suryamani's dwelling-house, and that in consequence thereof she was compelled to raise money by executing the kabala Ex. Q-5.

Their Lordships are of opinion that sufficient evidence has thus been given by the defendants to show that there was a compelling necessity on the part of the widow for entering into this transaction. They accordingly vary the decree of the High Court by deleting the transaction covered by the deed of sale, Ex. Q-5. In other respects the decree and judgment appealed against will be confirmed and the appeal will be dismissed. As there is no appearance on behalf of the respondents it will be without costs.

And their Lordships will humbly recommend His Majesty accordingly.

Solicitors for appellants : *Watkins and Hunter.*

A. de M. *Appeal dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE WALLACE.

Kolisetti Basavayya and others ... *Petitioners* (Defendants 1 and 3 to 5)*

v.

Mittapalli Venkatappayya and another ... *Respondents (Plaintiff and defendant).*

Basavayya v. Venkatappayya.

Civil Procedure Code, S. 149, O. 7, R. 11—Deficient Court-fee paid on plaint beyond time allowed—Court's power in case of—Order excusing delay—What amounts to—Order accepting payment without explicitly extending time—Effect—Validity—Review of order—Power of successor in office to grant—Refusal to review on erroneous view that successor has no power to review—Revision against order of—Interference in.

The Court has discretion to extend to any limit the time within which the deficient Court-fee on a plaint may be paid; and if the fee is paid within the time fixed the plaint will stand good as on the date of its presentation.

When the plaintiff pays the deficient Court-fee beyond the time fixed, two courses are open to the Court. It may either reject the plaint or accept it.

*C. R. P. No. 677 of 1925. 18th February, 1926.

Both courses are within its discretion with which a superior Court will not as a rule interfere.

When the plaintiff pays the deficient Court-fee beyond the time fixed and has not asked the Court to extend the time for payment, but the Court nevertheless excuses the delay and receives the fee, the natural inference is that it intended to extend the time and in effect did so.

A plaint was returned for two reasons, (1) to pay deficient Court-fee, and (2) to compare the copy of accounts. Seven days' time was given. The plaint was not re-presented within the seven days, and a further extension of time was therefore given. The plaint was re-presented after the expiry of the extended period with a petition put in under S. 151, Civil Procedure Code, with an affidavit stating that the plaint had been mislaid and asking that the delay in re-presentation be excused. The deficient Court-fee was put in and paid on the same day. The District Munsif without giving notice to the other side made an order on that petition "excused." An application under O. 47, R. 1, to review that order was made to the District Munsif who succeeded the Munsif who had made the order. The former declined to review the order. being of opinion that he had no power to review it. On a revision petition filed against the order declining to grant the review, *held,* (1) that the former District Munsif must be deemed to have applied his mind to the delay in payment of the deficient Court-fee and to have decided to excuse the delay; (2) that his order was open to review by his successor; (3) that, though the view of the successor that he had no power to review was wrong, yet as the matter was within the discretion of the first District Munsif, and no new facts were shown to have appeared since he made the order excusing the delay, there was no ground for interference with the order of the successor refusing to review the same.

Petition under S. 115 of Act V of 1908 and S. 107 of the Government of India Act praying the High Court to revise the order, dated 26th August, 1925 of the Court of the Additional District Munsif of Guntur in C. M. P. No. 853 of 1925 in O. S. No. 136 of 1925.

V. Govindarajachari and *B. T. M. Raghavacharlu* for petitioners.

K. Kameswara Rao for respondents.

The Court delivered the following

JUDGMENT :—This Civil Revision Petition is against the decision of the Additional District Munsif, Guntur, declining to grant a review of an order by his predecessor excusing delay in re-presentation of a plaint. The facts were as follows: A plaint was presented on 20th April, 1923, with a one rupee stamp, the proper stamp being Rs. 142. It was returned on 4th June, 1923, for two reasons, (1) to pay deficient Court-fee, and (2) to compare the copy of accounts. Seven days' time was given. On 16th June, 1923, a further extension of time of 10 days was given. The plaint was not re-presented

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until 4th March, 1924. On that date a petition was put in by the plaintiff under S. 151, Civil Procedure Code, with an affidavit by the pleader's clerk stating that the plaint had been mislaid and asking that the delay in re-presentation be excused. The deficient Court-fee was put in and paid on the same day. On 5th March, 1924, the District Munsif, without giving notice to the other side made an order on that petition "excused". On 20th August, 1925, the present District Munsif was asked under O. 47, R. 1, Civil Procedure Code, by the defendant to review that order and he has declined to do so, and the defendant comes up with this petition.

The first point urged is that there was really no definite order by the first District Munsif indicating that he gave his mind to the long delay in paying up the deficient Court-fee, and therefore it was open to his successor to consider that matter *de novo*. Certainly the affidavit filed in support of the application for excusing delay does not make any mention of the payment of the Court-fee and was not put in under S. 149, Civil Procedure Code, but under S. 151, Civil Procedure Code. Nevertheless I think it must be held that the matter was brought to the notice of the District Munsif and that he exercised his mind consciously thereon and decided to excuse the delay in paying up the deficient Court-fee. That was the chief question in the matter of excusing the delay in re-presentation and I must take it that the District Munsif applied his mind to it.

That being so, it was open to his successor to treat that order as one open to review by him if proper and legal grounds for review were made out. The Lower Court, however, seems to regard the matter as one which it had no power to review. That view seems to be wrong. But since the matter was within the discretion of the first District Munsif, and since it has not been brought to my notice that any new facts have appeared since that order was passed, there is no ground for interference with the Lower Court's refusal to review unless the first District Munsif had no jurisdiction whatever to excuse delay. Even so, the more proper course would have been for the petitioner to have come up here at once against the order excusing delay. Had he done so, he would have been able to urge with more propriety that the District Munsif should have given notice to him and heard him before he passed his order excusing delay. That he did not do, and the order was passed on 5th

March, 1924. He did not come up here against it, and even his petition for review was belated, having been put in on 20th August, 1925. In such circumstances I would not interfere unless it is an absolute rule of law that such condonation of delay is illegal.

This is the second point urged before me, namely, that the District Munsif had no option but to dismiss the plaint since the deficient Court-fee was not paid within the time allowed. O. 7, R. 11, Civil Procedure Code, is called in aid, and various rulings have been cited before me.

O. 7, R. 11 declares that when a plaintiff does not pay the deficient Court-fee within a time to be fixed by the Court the plaint shall be rejected. That the Court must fix a time within which the deficient Court-fee shall be paid and has no discretion to refuse to fix it, is settled law. The Court also has discretion to extend the time already fixed. S. 149, enacted in order to set at rest a matter on which the case-law was conflicting, implies that the Court may, in its discretion, at any stage, allow a party to pay the deficient Court-fee. But this will not override O. 7, R. 11 in the sense that S. 149 gives the Court any discretion to *refuse* to grant the time which O. 7, R. 11 says it shall grant—see *Achut Ramchandra* v. *Nagappa Bab Balgya* (1) and *Jiwan Das* v. *Khushabi Ram* (2). This seems to make it clear that the Court has discretion to extend to any limit the time within which the deficient Court-fee may be paid, and that if the fee is paid within the time fixed the plaint shall stand good as on the date of its presentation. What is the law then when the party pays beyond the time fixed and has not asked the Court to extend the time for payment, but the Court nevertheless excuses the delay and receives the fee? I think the only reasonable interpretation is that the Court has implicitly, although not explicitly, extended the time. Two courses are open to the Court in such cases, either it may reject the plaint or it may accept it, and both courses are within its discretion. That is, whether it rejects or accepts a superior Court will not as a rule interfere. When the Court has accepted a belated payment but has not explicitly extended the time, the natural inference is that it intended to extend the time and in effect did so—see *Gopal Prasad Bhagat* v. *Rajendra Lal Panja* (3), *Maria Thangathammal* v. *Iravatheswara Aiyar* (4),

1. (1913) I L R 38 B 41
2. (1917) 39 I C 766.
3. (1915) 34 I C 625.
4. (1915) 28 I C 504.

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Priyanath v. *Meajan* (5), *Amir Hussain Khan* v. *Nanak Chand* (6) and *Rajkishori Koer* v. *Madan Mohan Singh* (7). An extension of time to quote authorities was held to imply an extension of time to pay. To the other effect, namely, that the Court has no discretion to admit payment after the time fixed is a ruling in *Brahmomoyi Dasi* v. *Andi Si* (8) under the old Code. In *Midnapur Zamindary Co., Ltd.* v. *Secretary of State for India* (9) the Appellate Court refused to interfere with an order by the Lower Court rejecting the plaint because the additional Court-fee had not been paid within the time fixed. Possibly the language used is too strong when the learned Judges say that the Subordinate Judge had "no other alternative but to reject the plaint." S. 149 is not referred to in the judgment. The Full Bench case in *Padmanund Singh* v. *Anant Lal Misser* (10) was under the old Code and therefore the discretion given by S. 149 was not considered. In *Budhan Sha* v. *Sitanath Sha* (11) it was held that S. 149 will not avail if the payment is not made within the time fixed under O. 7, R. 11. In that case the prior Court had first dismissed the suit and on review held that S. 149 gave it discretion to excuse and condone the delay. The ground on which the learned Judges held that S. 149 will not avail was that it only applies to cases where the payment has been made within the time fixed, and that it gives no discretion to a Court to condone a payment made after the time fixed. But, with respect, I think that this is giving too narrow a construction to the wording of S. 149. That section is one of the general provisions of the Code not liable to annulment or alteration by any proceedings under Part X, and if there is any conflict between such a general provision and a rule under the first schedule, I take it that the general provision must prevail. The section appears to me to give a Court wide discretion, once the time for payment has been fixed, either to allow payment at any stage or to disallow it. I am not prepared to hold that the order of the District Munsif excusing delay in re-presenting the plaint was illegal.

It would no doubt have been better in the present case if the first District Munsif had given notice to the petitioner and heard him before excusing the delay, but his omission to do so

5. (1915) 24 C L J 88. 6. (1910) 12 C L J 62.
7. (1903) I L R 31 C 75. 8. (1899) I L R 27 C 376.
9. (1916) I L R 44 C 352. 10. (1906) I L R 34 C 20 (F B).
11. (1910) 13 C L J 78.

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is certainly not an unimpeachable ground for review and cannot therefore be used here to justify interference with an order passed on review. I am therefore not able to hold that the Lower Court in refusing to interfere with the order of its predecessor excusing delay committed any error of law. I therefore decline to interfere and dismiss this petition with costs.

A. S. V. *Appeal dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—MR. JUSTICE RAMESAM.

A. G. Sambasiva Aiyar ... *Appellant** (*Plaintiff*)

v.

Venkatarama Aiyar and others... *Respondents* (*Defendants*).

Sambasiva Aiyar v Venkatarama Aiyar.

Transfer of Property Act, S. 8—Vendee—Unpaid purchase money due by Sale of, in execution of decree against vendor—Lien of vendor for unpaid purchase money if passes to purchaser—Irregularity of execution proceedings—Title of execution purchaser if can be questioned by vendee on ground of—Lien for unpaid purchase money—Attachment of debt in case of—O. 21, Rr. 46, 54—Applicability.

P owed plaintiff a sum of money on a promissory note. *P* sold some of his properties to *D*, the father of the defendants, and left a portion of the purchase money in *D's* hands with instructions to remit the same to plaintiff towards his promissory note debt. *D* remitted the sum to plaintiff but the latter refused to accept the amount on the ground that more was due to him. Plaintiff thereupon obtained a decree against *P* on the note, and in execution of that decree, he attached the debt due to *P* from *D*, consisting of the unpaid purchase money with interest, and purchased it himself. Subsequently the plaintiff instituted the suit out of which the appeal arose to recover the amount from the defendants claiming also a lien upon the properties sold to *D*, their father. The question was whether the plaintiff was entitled to the lien claimed by him.

Held, reversing the Courts below, that the plaintiff was entitled to the lien claimed by him.

The amount left in *D's* hands did not cease to be unpaid purchase money because it was remitted by him to plaintiff and the latter refused to accept it.

Under S. 8 of the Transfer of Property Act *P's* lien as regards the unpaid purchase money passed to the plaintiff by virtue of the sale certificate along with the debt.

The attachment of the debt due to *P* from *D* was correctly effected under O. 21, R. 46, Civil Procedure Code; and, even if it was not and the execution proceedings culminating in the sale certificate were irregular, the said proceedings having become final between the plaintiff and *P*, the title of the plaintiff to

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* S. A. No. 893 of 1923. 20th January, 1926.

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the debt and the charge could not be questioned by the defendants on the ground of mere irregularity in the execution proceedings.

Second Appeal against the decree of the District Court of East Tanjore at Negapatam in A. S. No. 194 of 1922 preferred against the decree of the Court of the District Munsif of Mayavaram in O. S. No. 287 of 1920.

T. S. Ramaswami Aiyar and *V. Sundaram Aiyar* for appellant.

M. Subbaroya Aiyar for respondents.

The Court delivered the following

JUDGMENT :—The facts of this case may be stated as follows :—One Perambala Chetti owed the present plaintiff a sum of money on a promissory note, dated 13th November, 1913. The said Perambala Chetti sold some of his properties on 16th October, 1914 to Doraiswami Aiyar, the father of the defendants, and left Rs. 560 out of the purchase money in the vendee's hands with instructions to remit the same to the plaintiff towards his promissory note debt. Doraiswami Aiyar remitted Rs. 625 to the plaintiff on 11th December, 1915 but the plaintiff refused to accept the amount on the ground that more sum than what was remitted was due. He afterwards instituted a suit against Perambala Chetti on the promissory note and obtained a decree and in execution of that decree he attached the debt due to Perambala from Doraiswami Aiyar, consisting of the unpaid purchase money with interest and purchased it himself. He now sues to recover the amount claiming also a lien on the suit properties. Unless the lien is upheld the plaintiff's suit would be barred by limitation. The District Munsif held that as the amount was remitted by Doraiswami Aiyar to the plaintiff and the plaintiff refused to accept it, it is not unpaid purchase money but it is only unaccepted purchase money and the plaintiff is not entitled to the lien. With this view of the District Munsif, I do not agree, assuming that the allegations of the plaintiff are true. It is true that Doraiswami Aiyar has followed the instructions of his vendor and has remitted the amount to the plaintiff. If Doraiswami Aiyar has not chosen to inform the vendor of the fact that the amount was returned and of his readiness to pay it to the vendor himself, I do not see how it ceased to be unpaid purchase money. I therefore think that the ground on which the Munsif decided against the plaintiff cannot be accepted.

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On appeal, the District Judge confirmed the decree of the District Munsif on another ground. He refers to *Moti Lal* v. *Bhagwan Das* (1) and says that the present case is covered by that decision. He comes to the conclusion that the plaintiff is not entitled to any charge relying on that judgment. I think the case has been entirely misunderstood by the learned District Judge. That case far from being against the plaintiff is in his favour. That case only lays down that where a plaintiff attaches a portion of the purchase money due to his judgment-debtor, under a sale deed by him, he cannot cause the property to be sold without previously bringing the debt to sale and purchasing it himself. The plaintiff in this case has followed the course indicated in that decision. The learned vakil for the respondent concedes that the judgment of the District Judge in so far as it rests on *Moti Lal* v. *Bhagwan Das* (1) cannot be supported ; but he seeks to support the decree on other grounds. His contention is that the charge has not been validly transferred to the plaintiff. He relies on *Kunchithapatham Pillai* v. *Palamalai Pillai* (2) and *Elumalai Chetti* v. *Balakrishna Mudaliar* (3). The former case only says that the charge must be assigned by a proper conveyance. The latter case only decides that where a promissory note has been endorsed, the right to an equitable mortgage connected with the promissory note does not pass by the endorsement. It seems to be now settled that the right to a mortgage can be transferred only by a registered instrument [see *Balagurumurthi Chetti* v. *Ramakrishna Chetti and others* (4) and *Official Receiver, Trichinopoly* v. *Lakshmana Aiyar* (5)] : but I do not think that these cases help the respondent. In the present case we have not got to do with a mortgage but only with a charge. " Charge " is defined in S. 100 of the Transfer of Property Act thus :—

" Where immoveable property is by act of parties or by operation of law made security for the payment of money to another and the transaction does not amount to a mortgage the latter person is said to have a charge on the property."

The distinction seems to be that whereas a mortgage amounts to a transfer of property, a charge does not amount to one If there is no transfer of immoveable property, the assignment of the charge need not be made by a registered instrument. The right of the debt being an actionable claim can be transferred only by an instrument in writing under S. 130

1. (1909) I L R 31 A 443. 2. (1916) 32 M L J 347.
3. (1921) I L R 44 M 965: 41 M L J 297.
4. (1921) 41 M L J 267. 5. (1921) 41 M L J 453.

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of the Transfer of Property Act. In the present case we have an instrument in writing, namely, the sale certificate issued by the Court. It is conceded by the learned vakil for the respondent that the sale-certificate need not be registered with reference to the exceptions of S. 17 of the Registration Act. It seems to follow that the right to the charge passes along with the debt. The learned vakil for the respondents relies on a dictum in *Subbaraju* v. *Seetharamaraju* (6) and contends that S. 8 of the Transfer of Property Act does not apply to Court sales. The passage relied on is not quite intelligible to me. I do not see why, under S. 8 of the Transfer of Property Act, the vendor's lien does not pass with the right to the money. It is true that S. 2 (*d*) of the Transfer of Property Act provides that the Act does not affect transfers by operation of law. But in the present case the contention of the appellant does not seek to affect the effect of the execution sale. The effect of applying S. 8 is to strengthen the sale-certificate by transferring the lien along with it. I am therefore of opinion that the right to the lien passed under S. 8 of the Transfer of Property Act along with the debt.

It is next contended that the execution proceedings which culminated in the sale-certificate to the plaintiff were irregular and cannot operate to transfer the right to the lien in favour of the plaintiff. He relies on O. 21, R. 54, Civil Procedure Code, and contends that the charge is immoveable property within the meaning of that rule and not moveable property within the meaning of R. 46. The appellant in reply relies on a decision in *Nataraja Aiyar* v. *The South Indian Bank of Tinnevelly* (7). That decision related to a mortgage and was followed by the Allahabad High Court in *Lal Umrao Singh* v. *Lal Singh* (8). The respondent contends that these decisions cannot be regarded as good law, after the other decisions above referred to by me which held that a right to a mortgage can be transferred only by a registered instrument being immoveable property. It is unnecessary for me to express any opinion here whether these decisions are correct in so far as they apply to mortgages. But I do not see any reason to doubt their correctness so far as they relate to charges which do not amount to mortgages or transfers of immoveable property.

6. (1914) I L R 39 M 283 at 286.
7. (1911) I L R 37 M 51: 22 M L J 105.
8. (1924) I L R 46 A 917.

I am therefore of opinion that the attachment was correctly effected under O. 21, R. 46; but apart from this, I think it is not open to the defendant to raise questions relating to the regularity or otherwise of the execution proceedings taken by the plaintiff against his judgment-debtor. The proceedings are final between the plaintiff and Perambala and whether they are regular or irregular, the title to the debt and the charge has passed to the plaintiff and it is not open to the defendant to question the plaintiff's title on the ground of mere irregularity in the execution proceedings.

The result is, I must hold, that the plaintiff is entitled to the lien on the facts alleged by him in the plaint and the grounds given by the Courts below for dismissing the suit cannot be supported. As the first Court did not go into the merits of the case but only tried two preliminary issues, the case will go back for being regularly tried on the merits.

The appeal is therefore allowed, the decrees of the Courts below are reversed, and the suit is remanded to the District Munsif's Court for disposal according to law.

The costs here and in the Lower Appellate Court will be paid by the respondents and the costs of the first Court will abide the result.

The Court-fee paid by the plaintiff here and in the Lower Appellate Court will be refunded to him.

A. S. V. *Decree reversed and suit remanded.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—MR. JUSTICE DEVADOSS AND MR. JUSTICE WALLER.

Kandaswami Udayan ...*Appellant** (*Appellant—1st deft.*)

v.

Velayutha Udayan (minor) by next friend and guardian Sengamalai Udayan ... *Respondent* (*Respondent—Plaintiff*).

Kandaswami Udayan v. Velayutha Udayan.

Hindu Law—Joint family—Sale of house by father—Suit by son to set aside—Sale found partly valid—Alienee if can enforce equitable rights in the suit—Remedy open—Separate suit for general partition—If barred—Res judicata—Procedure to follow.

A Hindu son sued for a declaration that the sale of a house effected by his father was not binding on him and for possession of the same and in the alter-

*L. P. A. No. 49 of 1925. 5th February, 1926.

Kandaswami Udayan v. Velayutha Udayan.

native if the sale was found valid to the extent of his father's share for possession of his own share. The sale was found to be valid so far as the father's share was concerned and the Court below decreed to the son his share in the house. In second appeal the alienee contended that as the other joint family properties were more than sufficient to meet the claims of the son, the equities in his favour should be worked out at once and that he should not be driven to another suit which might be barred by *res judicata*. *Held*, (1) the alienee's remedy was to sue separately for a general partition and therein try to get the house allotted to the share of his alienor and not to get the son's declaration suit converted into one for general partition. *Subba Goundan* v. *Krishnamachari*, (1921) I L R 45 M 449 and *Davud Beevi Ammal* v. *Radhakrishna Aiyar*, (1922) 44 M L J 309 followed; *Ramaswami Aiyar* v. *Venkatarama Aiyar*, (1923) I L R 46 Mad 815 explained; and (2) such a subsequent suit for general partition and for getting the alienated property allotted to the share of his alienor would not be barred by *res judicata*. *Sourimuthu* v. *Pavadai Pachia Pillai*, (1925) 49 M L J 679 dissented from.

Procedure to follow in such cases pointed out.

Appeal under cl. 15 of the Letters Patent against the judgment and decree of the Hon'ble Mr. Justice Odgers in S. A. No. 1700 of 1923 preferred against the decree of the District Court of Salem in A. S. No. 226 of 1921 (O. S. No. 615 of 1919 on the file of the Court of the Additional District Munsif of Salem) (O. S. No. 1553 of 1917 on the file of the Principal District Munsif's Court of Salem).

T. M. Krishnaswami Aiyar for appellant.

C. Krishnamachari for respondent.

The judgment of the Court was delivered by

Devadoss, J.

DEVADOSS, J.:—The plaintiff sued for a declaration that a certain alienation made by his father was not binding on him and prayed for possession of the property alienated and in the alternative that if the sale was good to the extent of his father's share, his share of the property should be delivered to him. The District Munsif held that the sale was a nominal transaction and that it was not binding upon the plaintiff and decreed the suit. On appeal the District Judge held that the sale was good to the extent of the father's share and decreed the plaintiff's share to him.

In Second Appeal it was contended that the alienee should be allotted the property alienated to him as there was other property belonging to the family which could satisfy the claim of the plaintiff. Mr. Justice Odgers who heard the Second Appeal declined to uphold the contention and dismissed the Second Appeal. The alienee's representatives have preferred this Letters Patent Appeal.

Kandaswami Udayan v. Velayutha Udayan.

Devadoss, J.

It is contended before us by Mr. T. M. Krishnaswami Aiyar for the appellant that the family property is more than sufficient to meet the claim of the plaintiff and that the alienee should not be deprived of the plaint property which is a house. It is urged that the appellants have an equity in their favour and that they should not be driven to a separate suit when the equities could be worked out in this case. The District Judge found that it would be unfair to allow the alienee to retain the property as the rest of the property which would devolve on the son consists entirely of outstanding debts which might or might not be good. The alienee, neither in his written statement nor in his evidence before the Lower Court placed before the Court sufficient materials which would enable it to ascertain whether the plaintiff's share could be met out of the other properties belonging to him and his father. In the written statement he did not care to put forward an alternative case that, in case the plaintiff was able to succeed to the extent of his share he should be allowed to retain the property sold to him as the family property was sufficient to meet the plaintiff's claim and the plaintiff would not be prejudiced by his being allowed to retain the property sold to him. Without an opportunity for the plaintiff to show that the property of the family is not sufficient to meet his claim and in the absence of evidence as to whether the plaintiff has got another house which is fit for his occupation, and that he would not be prejudiced by allowing the alienee to retain the house sold to him the Court would not be justified in granting relief to the alienee in the manner asked for by him even if such relief could be granted in this suit.

Is it competent for the Court in a suit by a coparcener for setting aside an alienation of a certain item of family property to grant relief which it could grant on a general partition? Mr. Krishnaswami Aiyar relies strongly upon *Ramaswami Aiyar* v. *Venkatarama Aiyar* (1) as supporting his contention. In that case Mr. Justice Phillips and Mr. Justice Venkatasubba Rao held "that the alienee need not be directed to institute a separate suit to work out his rights by a partition. He was entitled in the coparcener's suit as a defendant to get a decree for partition and claim to be allotted the item purchased by him in respect of his vendor's share if that was consistent with the rights of the other coparceners."

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1. (1923) I L R 46 M 815: 45 M L J 203.

Kandaswami Udayan v. Velayutha Udayan.

Devadoss, J.

It was held in *Subba Goundan* v. *Krishnamachari* (2) by Mr. Justice Kumaraswami Sastri and one of us that in a suit instituted by the coparceners of a joint Hindu family to set aside a sale of ancestral immoveable property by their father or manager of the family on the ground that the sale was not for family necessity and to recover possession of the property from the vendees that "the latter were not entitled as defendants to insist in this suit on the plaintiffs submitting to a partition either of the items sold or of the entire family property but that they were entitled in this suit to a decree declaring that they are entitled to the share of the alienor but that they should be left to work out their rights by a separate suit for partition."

A careful perusal of the judgment in *Ramaswami Aiyar* v. *Venkatarama Aiyar* (1) would show that there is no real conflict between it and the decision in *Subba Goundan* v. *Krishnamachari* (2) though the observation of Mr. Justice Phillips at page 821 may appear to be so. "If any equity exists in the alienee and it can be enforced without a separate suit there seems to me to be no reason for restricting that equity to a mere right to sue, a limitation which cannot be supported on equitable principles." He also observes: "No doubt in many cases it would not be easy to enforce the alienee's equitable right in a suit by one of the coparceners to recover the property because it would be necessary to add all the coparceners to the suit and ascertain the amount of family property available for division, etc." If the Court is prepared to convert a suit for a declaration that certain alienation by a member of a joint Hindu family is not binding on the plaintiff into a suit for general partition at the instance of the alienee-defendant then the suit becomes a suit for a general partition. The decision in *Ramaswami Aiyar* v. *Venkatarama Aiyar* (1) applies to cases where all the facts are before the Court which would enable it to allow an alienee to retain the property and such a suit is practically a suit for partition. What was held in *Subba Goundan* v. *Krishnamachari* (2) was that there must be a separate suit for partition for in a suit where one item of property is sought to be recovered on the ground that the alienation of it is not binding on the plaintiff, the whole family should not be driven to be parties to a suit for partition. The proper course for the alienee would be to sue

1. (1923) I L R 46 M 815: 45 M L J 203.
2. (1921) I L R 45 M 449: 42 M L J 372.

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for partition and ask the Court to allot to his alienor the specific property conveyed to him and if the Court finds that the interests of the other coparceners would not be prejudiced by allotting to the alienating coparcener the specific property alienated by him, the Court may allow the alienee to retain the property. We adhere to the view expressed in *Subba Goundan* v. *Krishnamachari* (2) and as pointed out in that case at page 464 "having regard to the provisions of the Civil Procedure Code which do not allow any wide rights of counter-claim it is difficult to see how a suit by the plaintiffs for possession and mesne profits can be converted at the instance of the defendants into one for a general partition which would involve the presence of other parties and an enquiry into the debts and liabilities of the family. If the claim of the defendants is to be treated as a cross-suit, and if the written statement is to be stamped as a plaint in such cross-suit claiming a general partition, there is no reason why the defendants should not file their own suit for a general partition and work out any decree which they may obtain in the decree in the suit by the coparceners. There is no special advantage in the defendants doing in their written statement what they could easily do in a plaint filed by them. It is open to them as soon as a coparcener files a suit for possession, to file a suit for partition, and where proper grounds exist the Court would try the suits together so as to afford relief to all parties. On the point of view of hardship we think that the hardship would be greater if a simple suit for possession which the coparcener is in law entitled to file in cases of invalid alienations is converted into an elaborate enquiry as to a general partition of the family."

In *Davud Beevi Ammal* v. *Radhakrishna Aiyar* (3), it was held "that a purchaser from a member of a joint Hindu family of property which that member has no right to sell, it being the joint property, can enforce the sale only by a partition of the entire family property; and if in such partition the properties sold can with due regard to the interests of the other sharers, to the debts due by the family, and to an equitable allocation of the various items of the family property, to shares of the several coparceners, be wholly allotted to the vendor's share, the purchaser will be entitled to the whole property which the vendor professed to convey to him."

2. (1921) I L R 45 M 449: 42 M L J 372.
3. (1922) 44 M L J 309.

Kandaswami Udayan v. Velayuthia Udayan.

Devadoss, J.

It is urged by Mr. Krishnaswami Aiyar that a separate suit would be barred by the principle of *res judicata* and therefore the Court should consider in this suit whether the alienee could be allowed to retain the property sold to him. In *Sourimuthu v. Pavadai Pachia Pillai*(4) Mr. Justice Phillips and Mr. Justice Ramesam held that if a decree is obtained by a member of a joint Hindu family against an alienee for his share of the property alienated on the ground that the alienation was not binding on him, in a subsequent suit by the alienee for a general partition and for the allotment of the alienated property to the share of the alienating coparcener the property allotted to the plaintiff in the previous suit could not be allotted again to the alienating coparcener's share and therefore the second suit is barred by *res judicata*. With very great respect to the learned Judges we are unable to agree with the view taken by them in that case. When a coparcener brings a suit for declaration that an alienation by another coparcener is not binding on him and for his share of the property alienated the Court gives him a decree for his share, if it finds that the alienation is not binding on the plaintiff. But his share does not become absolutely his for, the alienating coparcener still continues a member of the joint family, and on a suit for partition by him the property alienated may fall to his share in which case the alienee would be entitled to get it. The matter is not different when the alienee himself brings a suit for a general partition and prays to be allowed to retain the property which was sold to him. When a member of a joint Hindu family sues to set aside an alienation made by another coparcener that suit is not for partition and does not involve necessarily the status of division between him and the other members of the joint family. All that is objected to is the alienation of the particular item and if that alienation is not binding on the family it is not binding on the alienor's share as well and the property is recovered for the benefit of the family. The alienor so long as he is a member of the joint family, his right to partition subsists and in a suit by him he can ask that the property alienated by him may be allotted to his share and if the Court on a consideration of all the circumstances in the case thinks that it would be equitable to allot to him that property it might do so, for the plaintiff in that suit for setting aside an alienation cannot set up the plea of *res judicata* against any relief. If the principle of *res judicata* would not avail

4. (1925) 49 M L J 679.

against the alienating coparcener it is difficult to see how it could avail against the alienee who stands only in the shoes of the alienating coparcener. To hold that a suit by an alienee for partition is barred by *res judicata* by reason of a previous suit in which the alienation was held binding only to the extent of the alienor's share, would be to leave no option to the Court but to convert every suit for setting aside an alienation into a suit for general partition. Would it be equitable to enforce a general partition in a suit to set aside an alienation when the property alienated bears an insignificant proportion to the property owned by the family? It is neither reasonable nor expedient that a suit to set aside an alienation of a certain item of property should be converted into a suit for general partition at the instance of a vendee who bought the property knowing perfectly well his vendor was not exclusively entitled to the property and that even in a general partition, that property might not be allotted to his share.

We therefore hold that a suit by the vendee would not be barred by the decree in the suit of a coparcener to have his share of the alienated property partitioned between him and the alienee.

The proper course for the alienee would be as pointed out by us in *Subba Goundan* v. *Krishnamachari* (2) when the alienation of a particular item of property is challenged by a member of the joint Hindu family to bring a suit for general partition so that the suit might be tried along with the suit for setting aside the alienation and if the alienee is able to show that the alienation is binding on the whole family then he succeeds in both the suits and if the alienation is not binding on the plaintiff's share but is only binding on the alienor's share, then in the suit for general partition brought by him the Court would be in a position to consider whether the property alienated to him should be allotted to the alienor's share or not. If both the suits are tried together there would not be any difficulty at all and in this case in order to obviate any possible plea of *res judicata* which might be raised on the strength of the decision in *Sourimuthu* v. *Pavadai Pachia Pillai* (4) we would pass a decree as was done in *Hanmandas Ramdayal* v. *Valabhdas* (5). In that case a minor brought a suit against his father and decree-holders as well as auction purchasers for a declaration that the plaintiff's half-share in the two properties

2. (1921) I L R 45 M 449 : 42 M L J 272. 4. (1925) 49 M L J 679.
5. (1918) I L R 43 B 17.

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Devadoss, J.

sold did not pass to the auction purchasers and for possession of his half-share on equitable partition. He obtained a declaration that his share was not bound. It was held that his interests did not pass to the purchasers at the Court-sale. The learned Judges upheld the decree of the Lower Court and stayed the execution of the decree for three months directing "that if during that period of three months the present appellant filed a suit for partition against the plaintiff the stay of the present decree should last until the disposal of the appellant's suit for partition but if such a suit for partition be not brought within three months allowed then this appeal to be dismissed with costs." We think such a direction should be given in this case.

We therefore dismiss the Letters Patent Appeal with costs and direct that the execution of the decree in plaintiff's favour be stayed for three months and if before the expiry of that period the appellant brings a general suit for partition then the stay would continue till the disposal of the suit for partition but if no such suit for partition is brought then the stay of execution will stand cancelled.

T. S. V. *Appeal dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE ODGERS.

D.B. Pachiappa Chetti and others... *Appellants** [(*Plaintiffs*) *4th appellant declared a major, and next friend discharged* (vide *Order dated 18th October,* 1922 *on C. M. P. No.* 2555 *of* 1922]

v.

C. Venkatachariar and others ... *Respondents (Defendants 1 to 5 and L. R. of 6th defendant).*

Pachiappa Chetti v. Venkatachariar.

Civil Procedure Code, S. 47 and O. 21, Rr. 95, 97 and 103—Scope of—Mortgagee purchaser of property—Money decree purchaser in possession—Application by mortgagee for delivery—Referred to suit—Remedy—Order appealable as one under S. 47—Suit barred—Remedies if cumulative.

At a sale held in execution of a mortgage decree the mortgagee purchased the property. Meanwhile in execution of a money decree against the same judgment-debtor, the same property had been sold and purchased by a third party. The mortgagee-purchaser applied for delivery of possession under O. 21, R. 95, and the Court thinking it was a petition for removal of obstruction under O. 21

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*S. A. No. 286 of 1922. 24th February, 1925.

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R. 97, passed the order "Refer him to suit." Thereupon the mortgagee purchaser filed a suit for establishing his title *Held*, his remedy was not by way of suit under O. 21, R. 103, but by way of appeal against the order under S. 47, Civil Procedure Code.

The remedies by way of suit under O. 21, R. 103, and by way of appeal under S. 47 are not concurrent and where the order is one under S. 47, the only remedy is by way of appeal.

An order under O. 21, R. 97 can only be made after investigation by the Court.

Case-law referred to.

Second Appeal against the decree, dated 18th April, 1921 of the District Court of Salem in A. S. No. 52 of 1916 preferred against the decree, dated 11th October, 1915 of the Court of the Temporary Subordinate Judge of Salem in O. S. No. 12 of 1915 (O. S. No. 2 of 1913 on the file of the District Court, Salem).

A. Krishnaswami Aiyar and *B. Somayya* for appellants.

K. V. Krishnaswami Aiyar and *K. V. Sesha Aiyangar* for respondents.

The Court delivered the following

JUDGMENT :—This was a suit to establish the plaintiffs' right to the suit property and to recover the same from defendants 1 to 5, if necessary after division, and for mesne profits. The Temporary Subordinate Judge of Salem decreed the suit in favour of the plaintiffs holding that they were entitled to a two-third share in the leasehold right in the plaint village with mesne profits. On appeal to the District Judge of Salem he found that the suit was not maintainable in law and dismissed it. The property originally belonged to the 6th defendant and his sons. It was mortgaged under two mortgage deeds, Exs. A and B, to the plaintiffs' father. We are only concerned with the first of these mortgages, dated 11th July, 1898. The plaintiffs sued on the mortgages, got a decree on 28th August, 1907, executed it and purchased the property in Court sale on 28th January, 1909. They tried to take possession on 21st May, 1910 (Ex. C-4), and the 1st defendant and others obstructed. These latter had bought the property on 9th December, 1908 in execution of a money decree obtained by them on 10th April, 1901 in O. S. No. 698 of 1898 on the file of the Tirupatur Munsif's Court. When the 1st defendant in 1908 proceeded to execute his decree the plaintiff's father on 26th October, 1908, put in a claim petition to the Execution Court that the Court sale should be subject to his mortgages. The claim was dismissed on 6th November, 1908, and the

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1st defendant bought the property in Court sale on 9th December, 1908.

The first point taken before me on appeal from the District Judge is with reference to the order made on Ex. C-5. Ex. C-5 is a petition, dated 25th September, 1912 by the plaintiffs under R. 95, O. 21, Civil Procedure Code and they pray that the 1st plaintiff having now become a major the said property may be delivered to the 1st plaintiff on behalf of all the plaintiffs. The order of the learned District Judge on this petition, dated 24th October, 1912 was, "Refer him to suit". This is obviously a reference to O. 21, R. 103 where a party not being a judgment-debtor against whom an order is made under R. 98, R. 99 or R. 101 may bring a suit. This portion of the order of O. 21, Civil Procedure Code, begins with R. 97 and is headed "Resistance to delivery of possession to decree-holder or purchaser," whereas R. 95 is in a different part of the order headed "Sale of immoveable property". It is not disputed that if the application was in fact under R. 95, the order of the learned Judge must be taken to be an order under that rule, that S. 47, Civil Procedure Code, is applicable and that the plaintiffs' remedy was not by a suit under R. 103, O. 21, but by appeal from the order under S. 47 which appeal is specifically given by the Code under S. 2 (2) and S. 96. This point was not taken in the first Court but the learned District Judge allowed it to be taken before him, and as it has been argued *in extenso* before me I must deal with it. The learned District Judge thought that, though Ex. C-5 made no reference to any obstructions and owing to lapse of time the affidavit in support of the petition was not available before him, some reference to an obstruction must have been made therein, otherwise the Court would have ordered delivery which would have been the appropriate order under R. 95 and not have referred the plaintiffs to a suit. The learned Judge therefore held that Ex. C-5 was an order passed in execution on a matter of removal of obstruction to delivery of possession and therefore that the order in Ex. C-5 was one made against the plaintiffs in that the Court refused to carry out their prayer for delivery and referred them to a suit. With regard to that I entertain grave doubts whether the learned Judge was right. Mr. K. V. Krishnaswami Aiyar for the respondents contends that, assuming the order in Ex. C-5 was one under R. 103, the terms of the rule have not been complied with and the plaintiffs are therefore not persons against whom an order has been made and therefore no remedy by a suit

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under R. 103 was open to them. All one can say is that there was no evidence that in October 1912 there was a continued or renewed obstruction by the defendants such as has been reported to the Court in June, 1910 (Ex. C-4). It looks as if the Court was mistaken and thought that the petition, Ex. C-5, was really under R. 97 and hence referred the plaintiffs to a suit. However that may be, it will not affect my decision on the main point which I now proceed to consider. It was urged for the plaintiffs-appellants before me that the remedy under R. 103 does not take away the right of appeal under S. 47. Three cases are referred to in *Sivasamba Aiyar* v. *Kuppan Samban* (1) where it was held that S. 47 is comprehensive and the fact that an alternative procedure by suit instead of appeal is provided in certain circumstances cannot affect its character. In *Meyyappa Chetti* v. *Chidambaram Chetti* (2), a decision of the same two learned Judges, they held that O. 21, R. 103 should not be read as providing expressly against any right of appeal which would otherwise be available. *Badmi Seshayya* v. *Katti Chinna Mariappa* (3) was also referred to in this connection where a Bench of this Court held that R. 103 is not restricted by the general provisions of S. 47. I might add that this latter is a short judgment and no reasons are given for the decision. In *Veyindramuthu Pillai* v. *Maya Nadan* (4) decided by the learned Judges who decided the cases just cited from the *Madras Law Journal,* they held that where claim proceedings under O. 21 fall also under S. 47, O. 21, R. 103 does not prevent an appeal against an order therein as it falls under S. 47 of the Code. That is to say, that with regard to this case and those cited from the *Madras Law Journal,* it was held that a suit under R. 103 does not bar an appeal under S. 47. The learned Judges did not consider the case here, namely, whether a case really arising under S. 47 would bar a suit under R. 103. I agree with the contention of the learned vakil for the respondents that the cases cited [with the possible exception of *Badmi Seshayya* v. *Katti Chinna Mariappa* (3)] do not establish the proposition that the two remedies are concurrent, so that assuming that this is a suit under R. 103 and that the order in Ex. C-5 was really one under S. 47, it was not open to the plaintiffs to proceed at their option either by a suit or by way of appeal. It is also to be observed that S. 47 expressly bars a suit in contra-distinc-

1. (1915) 29 M L J 629. 2. (1920) 39 M L J 603.
3. (1918) 52 I C 928. 4. (1919) I L R 43 M 696 at 699 : 38 M L J 32.

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tion to R. 103 which says that the order on obstruction proceedings shall be conclusive subject to the result of the suit, if any. It has, as far as I know, never been suggested in any case that the procedure under S. 47 and under R. 103 is cumulative. If this were the law it is not difficult to imagine that anomalies would arise. I must hold therefore that the learned District Judge was right in holding that the matter arose under S. 47 and that therefore the plaintiffs ought to have appealed. For this appeal they are now of course hopelessly out of time. The appellants therefore urge the matter which will be dealt with hereafter under the third point. Further the rules provide that an investigation should be made under R. 97 (2), and this is a *sine qua non* of an order under Rr. 98 and 99. These rules bear some analogy to Rr. 58 and 63 which are headed "Investigation of Claims and Objections". But it will be observed that under R. 63 no investigation is necessary and a suit can be brought by the party against whom an order is made. That an investigation is necessary under R. 97 (2) is clear from the ruling in *Sarat Chandra Bisu* v. *Tarini Prasad Pal Chowdhuri* (5), *Majjiga Venkatasubba Reddi* v. *Chundi Linga Reddi* (6) by a Bench of this Court and *Gouri Churn Patni* v. *Sita Patni* (7). This only shows again that the plaintiffs ought to have appealed from the order passed on Ex. C-5 if it was mistakenly made under R. 95 as mentioned above or in any case as having been passed without complying with the condition precedent laid down in R. 97 (2). However, there is nothing whatever on the record here to show that any investigation was in fact made. I must therefore decide against the appellants with regard to the first point.

The second point is that an act of the Court should not be allowed to injure the appellant. If the Court made a mistake in referring the appellant to a suit he should not suffer and there was no obligation on him to file an appeal against that order. The reply is this, that no estoppel is pleaded and there is nothing on the record to show that the respondent was responsible for the order passed.

The third point is that if as I have held an appeal ought to have been preferred against the order on Ex. C-5 I should convert this into an appeal under S. 47, Civil Procedure Code. It is pointed out that as the point was taken by the District Judge, appeal against the order passed by him holding that

5. (1907) I L R 34 C 491. 6. (1917) 41 I C 640.
7. (1909) 14 C W N 346 at 351.

the matter falls under the purview of S. 47 lies to this Court. The order passed on Ex. C-5 was by a former District Judge and was therefore *res judicata* in the Lower Appellate Court. The authority quoted for so treating the appeal is the judgment in C. M. A. No. 127 of 1920 where the learned Judges held that in the facts of that case they should exercise the power. It may be pointed out that the order was one passed in 1912 and I am being asked over 12 years after that time to allow the erroneous procedure taken on that order to be eliminated and practically that the parties should be absolved from the course they took. On the other side, it is represented that the fault, if any, was with Court and that the plaintiffs may have been misled by the order passed on Ex. C-5. It will be observed that there is no contention in the written statement that the plaintiff's suit was misconceived and even if there were, it is now too late for an appeal under S. 47. Further *Muttiya* v. *Appasami* (8) shows that the petition, Ex. C-5, is perfectly legal under S. 47 although the petitioners therein had been previously obstructed. It was held there was nothing to prevent the decree-holder or purchaser who had been obstructed or resisted in his attempt to get possession of the property from making a fresh application for delivery. [*See* also *Abdul Kareem Sahib* v. *Timmaraya Chetti* (9), a judgment of this Court]. The learned District Judge considered this question very carefully in paragraph 17 of his judgment. He held that the decision in Ex. C-5 was a decision on jurisdiction and that not having been appealed against and there being no prayer in the plaint in the suit to set it aside it was final as regards himself and barred the present suit being converted into an execution application and that in either view the suit viewed as an application for possession is out of time. Under S. 47 (2) the Court is at liberty to treat a proceeding under this section as a suit or a suit as a proceeding but subject to any objection as to limitation or jurisdiction. It seems to me that here the plea of limitation must prevail. It is said that there are good grounds for excusing the delay and for allowing the matter to be converted into a proceeding. I am however unable to agree. I think that the suit being misconceived *ab initio* the plaintiffs are not entitled to ask me in second appeal for such a concession as this. I therefore think that the appeal fails on all these grounds and must be dismissed with costs.

T. S. V. *Appeal dismissed.*

8. (1890) I L R 13 M 504. 9. (1914) 24 I C 512.

[FULL BENCH.]

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—SIR VICTOR MURRAY COUTTS TROTTER, *Chief Justice*, MR. JUSTICE PHILLIPS, MR. JUSTICE KRISHNAN, MR. JUSTICE BEASLEY AND MR. JUSTICE MADHAVAN NAIR.

Tiruvengada Mudali ... *Accused* in C. C. Nos. 3 and 10 of 1925 on the file of the Court of the Sub-divisional Magistrate of Vellore.*

v.

Tripurasundari Ammal ... *Complainant in do.*

F. B.

Tiruvengada Mudali *v.* Tripurasundari Ammal.

Indian Penal Code, S. 499, Exception 8—Complaint filed before a Magistrate—Defamatory statement made in—Absolute privilege—English Common Law—Importation of—If justified—Interpretation of Statutes.

A defamatory statement contained in a complaint filed before a Magistrate is not absolutely privileged, for Exception 8 to S. 499, Indian Penal Code, which is the only exception applicable to the case, expressly lays down that the privilege conferred by it on persons who prefer accusations against others extends only to those who make them in good faith.

A codifying Statute like the Indian Penal Code does not exclude reference to earlier case-law on the subjects covered by the statute for the purpose of throwing light on the true interpretation of the words of the statute where they are open to rival constructions; but matters outside the statute cannot be invoked, not by way of construing the provisions, but of adding something to it which is not to be found within it. The privilege defined by the exceptions to S. 499 must be regarded as exhaustive as to the cases which they purport to cover and recourse cannot be had to English Common Law to add new grounds of exception to those contained in the section. *In re Venkata Reddi*, I L R 36 M 216; *In re Muthuswami Naidu*, I L R 37 M 110 overruled.

Case referred for the orders of the High Court under S. 438 of the Code of Criminal Procedure, by the Sessions Judge of North Arcot in his letter, dated 28th July, 1925.

The Public Prosecutor (*J. C. Adam*) for the Crown.

The Court (Waller and Madhavan Nair, JJ.) made the following

ORDER OF REFERENCE TO A FULL BENCH

Waller, J.

Waller, J.:—This is a reference by the Sessions Judge, North Arcot. Petitioner filed a complaint against three persons charging them with offences under Ss. 448 and 323, Indian Penal Code. In that complaint he described the first of them as being the paramour of the second, the description being quite

*Cr R C No. 490 of 1925
(C R No. 66 of 1925) 15th February, 1926.

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Waller, J.

unnecessary for the purpose of the complaint, which had itself been preferred as a counterblast to a prior complaint presented against the complainant by one of the persons defamed. Respondent thereupon charged petitioner with defamation. The Sub-divisional Magistrate convicted him. The Sessions Judge has made a reference to this Court, pointing out that the conviction is illegal in view of the decision in *In re Muthusami Naidu* (1). That decision follows the well-known case in *In re Venkata Reddy* (2), in which it was ruled that neither party, witness, counsel nor judge could be held liable for defamation on account of words written or spoken in any proceeding before a Court recognized by law. The Judges remarked "We do not think that a statement in a complaint which initiates a proceeding should be held to be entitled to less privilege than other statements made by parties in the subsequent stages of the proceeding. If the complaint is false, then the defendant would be entitled to prosecute the complainant for preferring a false charge." I must confess that I am unable to see the force of the last argument in a case like this. This is not a case in which the charge is that the substance of the complaint itself is defamatory. What is charged is that, into a complaint of house-trespass and hurt, a malicious and irrelevant libel has been introduced. To suggest that the defamed person's sole and sufficient remedy is to prosecute the complainant for bringing a false complaint of house-trespass and hurt is to deprive him of any remedy whatever against the defamatory statement. The other argument is based on *Venkata Reddy's case* (2). I have elsewhere in Cr. A. No. 218 of 1925 expressed the view that it must now be held that the authority of that case has been severely shaken by a later ruling of this Court—*Gopal Naidu* v. *King-Emperor* (3). The earlier case was based on the Common Law of England; but it was pointed out in the later that the Criminal Law of India must be looked for in the Penal Code and that the Common Law of England should not be imported into it. The 8th exception to S. 499, Indian Penal Code, refers to what are described as "accusations." The illustration appended to the exception shows that in that term are included complaints to Magistrates, which are therefore entitled to no more than the limited privilege granted by the exception. "It is the duty of a Court to accept, if that can be done, the illustrations given as being both of relevance

1. (1912) I L R 37 M 110. 2. (1912) I L R 36 M 216: 23 M L J 39.
3. (1922) I L R 46 M 605: 44 M L J 655 (F B).

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and of value in the construction of the text." *Mahomed Syedol Ariffin* v. *Yeoh Ooi Gark* (4). Reading together Exception 8 and its illustration, there can, I think, be no doubt as to the construction of the text that the privilege accorded to persons who make complaints to Magistrates is of a limited character. If the privilege accorded to the complaint itself is not absolute, libellous statements made in the course of it are entitled to no greater protection. The law has, in my opinion, been correctly laid down in *Satish Chandra Chakravarti* v. *Ram Doyal De* (5) which expressly differs from the view hitherto taken in this Court. It is not for us to overrule the decision of another Bench of this Court, but it seems to me that, in the light of *Gopal Naidu* v. *King-Emperor* (3), the decision relied on by the Sessions Judge requires reconsideration. I would therefore refer to a Full Bench the question whether a defamatory statement made in a complaint to a Magistrate is absolutely privileged.

Madhavan Nair, J.

Madhavan Nair, J. :—I am also of the opinion that in view of the decision in *Gopal Naidu* v. *King-Emperor* (3), the case *In re Muthuswami Naidu* (1) requires reconsideration. I agree to the reference proposed by my learned brother.

The Public Prosecutor (*J. C. Adam*) for the Crown.

A. S. Sivakaminathan amicus curiae.

The Court expressed the following

OPINION :—In this case the petitioner filed a complaint against three persons charging them with offences of simple hurt and house-trespass under Ss. 323 and 448 of the Indian Penal Code. In that complaint he described two of them as being paramours. Thereupon he was charged with defamation and was convicted. The Sessions Judge referred the case to the High Court on the view that the decision in *In re Muthuswami Naidu* (1) following *In re Venkata Reddy* (2) established the position that statements such as that on which the conviction was founded were absolutely privileged. The correctness of the ruling in *In re Venkata Reddy* (2) has undoubtedly been questioned in the Full Bench case, *Gopal Naidu* v. *King-Emperor* (3). The learned referring Judges therefore very rightly took the view that the matter should be settled and that a Full Bench should reconsider the question and decide whether *In re Venkata Reddy* (2) was rightly decided.

1. (1912) I L R 37 M 110. 2. (1912) I L R 36 M 216: 23 M L J 59.
3. (1922) I L R 46 M 605: 44 M L J 655 (F B).
4. (1916) L R 43 I A 256. 5. (1920) I L R 48 C 388.

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We do not think that any useful purpose would be served by an exhaustive examination of the authorities such as was made by Mookerjee, Offg. Chief Justice, in *Satish Chandra Chakravarti* v. *Ram Doyal De* (5). It is not contested that the general trend of the Madras and Bombay authorities is to regard such statements as absolutely privileged and that the Calcutta and Allahabad Courts have taken the opposite view that the privilege is qualified only and should be taken as confined to the exceptions appended to S. 499 of the Indian Penal Code. The Rangoon Court also has recently in *MacDonnell* v. *King-Emperor* (6) adopted the Calcutta view. Our task is to consider the words of the statute and to say whether it leaves it open to the accused to contend that it is not exhaustive of all the cases of privilege which can be put forward. The suggestion is that the statute only concerned itself with cases of qualified privilege and legislated for them, leaving intact the absolute privilege conferred by the English Common Law on Judges, advocates, parties and witnesses.

Two propositions appear to us to be indisputable on the facts of the case as stated. The first is that the petitioner cannot bring himself within any of the exceptions to S. 499 for the simple reason that there is a finding against him that the statement that he made was not made in good faith. The only exception to the Indian section under which he could bring himself is the 8th and that expressly lays down that the privilege conferred by it on persons who prefer accusations against others extends only to those who make them in good faith. The second proposition (and the Crown does not contest it) is that, if the Common Law of England is to be held to apply to this case, the action of the petitioner would be absolutely privileged.

The words of the section itself as distinct from the explanations and exceptions are quite clear in their definition of what is *prima facie* to be regarded as defamatory.

"Whoever..........makes or publishes any imputation concerning any person, intending to harm, or knowing or having reason to believe that such imputation will harm, the reputation of such person, is said, except in the cases hereinafter excepted, to defame that person."

We have next to consider the decision in *In re Venkata Reddy* (2) which was a considered pronouncement of the then Chief Justice, Sir Arnold White, and two other Judges and it

2. (1912) I L R 36 M 216: 23 M L J 39.

5. (1920) I L R 48 C 388. 6. (1925) I L R 3 Rang 524.

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lies upon us closely to scrutinize the grounds on which that decision was based before we venture to dissent from it. As we follow that reasoning, it is based mainly on two considerations. The first is that it was not to be inferred that the framers of the Indian Penal Code intended to depart from the English law which is substantially reproduced in the statute unless they did so expressly or by necessary implication; the second, that, as the Code confined itself to dealing with cases of qualified privilege, it might be supposed that its authors intended to leave the provisions of the English Common Law regarding absolute privilege intact. The first line of reasoning is summarised in the observations of the learned Chief Justice at page 222 of the report: "It is not to be supposed that the framers of the Penal Code had not before their minds the doctrine of the English law with regard to the question of absolute privilege; and it seems to me that, in dealing with a matter of such importance, if they had intended to exclude its application, they would have made their intention clear and would not have left it to be a matter of negative inference."

The second line of reasoning is of course closely allied to the first but, as it seems to us, it is based on a misapprehension. Although S. 499 is silent as to absolute privilege, the Code as a whole is not; for it confers absolute privilege by S. 77 on a Judge "in the exercise of any power which is, or which in good faith he believes to be, given to him by law." That perhaps is a wider privilege than is given to an English Judge, because there are expressions in the English cases which lend colour to the view that the existence in fact of jurisdiction and not merely the honest belief in the possession of jurisdiction is a condition precedent to the privilege.

But the first line of reasoning is not obnoxious to this objection and raises a question of gravity and importance. It is undoubtedly remarkable that the draftsman of the statute who must have been familiar with the English Common Law made no reference to the position of witnesses or advocates *nominatim* but confined himself to the perfectly general language of the 8th and 9th exceptions. The inference drawn in *In re Venkata Reddy* (2) was that it was inconceivable that the statute should have been silent on such obvious topics unless it meant to leave the English Common Law relating to them intact. That is a line of reasoning which seems to us to be wholly inapplicable to a codifying statute and the Indian Penal

2. (1912) I L R 36 M 216: 23 M L J 59.

Code is obviously meant to be a codifying statute, an expression which may sufficiently for our present purposes be defined as a statute intended to be complete in itself with regard to the subject-matter with which it deals. Indeed the very title 'Indian Penal Code' involves the conception of a codifying statute. As we understand the principles of construction applicable to such matters, a codifying statute does not exclude reference to earlier case-law on the subject covered by the statute for the purpose of throwing light on the true interpretation of the words of the statute where they are, or can be contended to be, open to rival constructions. We are unaware of any instance other than the present where it has been argued that matter outside of the statute can be invoked not by way of construing its provisions but of adding something to it which is admittedly not to be found within it. We agree with Sir Arnold White, Chief Justice, that these matters must have been present to the mind of the draftsman. We differ from him in the inference to be drawn from the silence of the statute regarding them. It seems to us inconceivable that that silence can be interpreted otherwise than as a deliberate refusal to incorporate that part of the Common Law of England into the law of India.

In re Ramaswami Aiyar (7), a decision to which one member of this Court was a party, was cited as authority for the proposition that the Common Law of England could be imported into the Indian Penal Code and render acts that would *prima facie* be offences under the Code into acts not criminal or punishable. That was a case of a conviction under S. 341 of the Indian Penal Code for wrongful restraint and the restraint was held not to be wrongful within the meaning of the section because the restraint exercised in that case would not be civilly wrongful by the Common Law of England. The Court therefore thought itself entitled to treat the word 'wrongfully' as meaning 'tortiously' and it is not disputed that the law of this country with regard to torts must in the main be guided by principles derived from English law and English cases. The English authorities relied upon in that case were relied upon merely for the proposition that a restraint in such circumstances as there appeared would not be tortious in English law. It may very well be that a consideration of English Law was excluded by the definition of 'wrongful restraint' contained in S. 339 of the Indian Penal Code,

7. (1921) I L R 44 M 913.

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which was not brought to the notice of the Court and that therefore the case was decided on a wrong footing. Be that as it may, the case is not an authority for the proposition that the English Common Law can be imported into an Indian statute unless words are used which necessarily refer the Court for their interpretation to the English cases defining what is to be considered as a civil wrong.

We are therefore of opinion that the privilege defined by the exceptions to S. 499 of the Indian Penal Code must be regarded as exhaustive as to the cases which they purport to cover and that recourse cannot be had to the English Common Law to add new grounds of exception to those contained in the statute. At the same time we desire to guard ourselves against laying down any principle wider than that necessitated by this reference. The reference relates to the position of a complainant and the 8th exception and the illustration to it show clearly that the exception was meant to apply to complainants. The question of privilege that may attach to an advocate or a witness is not before us and we express no opinion as to whether it might or might not be possible to distinguish their positions. In the next place the question referred relates solely to criminal proceedings against a complainant and we say nothing as to how far he may be protected from civil proceedings. It no doubt seems anomalous that it should be a possible view that a man should be protected against civil proceedings but still exposed to a criminal prosecution; but we do not exclude the possibility, should the question arise hereafter, of that being the necessary conclusion from the fact that the criminal law of India is codified and the law of civil wrongs is not. We refer this case back to the Divisional Bench with the expression of opinion that no absolute privilege attaches to the statement made in this case. It will be open to that Bench, before whom the matter comes on revision, to consider whether the Sub-divisional Magistrate was right, on the footing of qualified privilege alone attaching to the statement made in this complaint.

Finally we desire to say this, that the divergence of judicial opinion on the subject referred to us and the allied subjects discussed in the argument is so great that we venture to suggest that further legislation defining for this country the limits of privilege, whether absolute or qualified, is eminently desirable.

T. S. V. *Reference answered.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE PHILLIPS AND MR. JUSTICE MADHAVAN NAIR.

Paidapati Venkatanarasu ... *Appellant* (Respondent in S. A. No. 672 of 1921 on the file of the High Court—Plaintiff)*

v.

Vikram Kotayya and two others ... *Respondents (Appellants in do.—Defendants 4, 9 and 12).*

Venkatanarasu *v.* Kotayya.

Civil Procedure Code, S. 105, cls. (1) and (2)—Order returning plaint for presentation to proper Court—Reversal of in appeal and order in appeal remanding case to Lower Court for disposal—Appeal from order of remand—Maintainability—O. 43, R. 1 (u); O. 43, R. 1 (a); and S. 104 (2)—Remand order if can be questioned in appeal from decree in suit—Civil Procedure Code, S. 105 (1)—Order "affecting the decision of the case"—What amounts to—Test.

In a suit to establish plaintiff's right to, and to recover possession of, the suit land on the ground that it formed part of the "Shroff Service inam land" of the village, the Munsif held that, by virtue of Madras Act III of 1895, Civil Courts had no jurisdiction to entertain the suit, and returned the plaint for presentation to the Revenue Court under R. 10 of O. 7 of Civil Procedure Code. On appeal, the District Judge, holding that the suit was triable in a Civil Court, set aside the Munsif's order and remanded the case to the Lower Court for disposal. The Munsif then decreed the suit, and his decree was confirmed on appeal by the Sub-Judge. In second appeal preferred against the decree of the Sub-Judge, *held,* (1) that the remand order of the District Judge was not appealable under O. 43, R. 1, cl. (*u*). but became final under S. 104, cl. (2) of the Code, and the defendants were not precluded by S. 105, cl. (2) of the Code from disputing the correctness of the order in second appeal, if they were otherwise entitled to do so; (2) but that as the order was not one "affecting the decision of the case" within the meaning of S. 105, cl. (1) of the Code, its propriety could not be questioned in second appeal under that clause.

Clause (*u*) of R. 1 of O. 43, Civil Procedure Code, contemplates an appeal only from an order of remand passed under O. 41, R. 23, *i. e.*, from an order of remand in an appeal against a *decree* in a suit which has been disposed of on a preliminary point.

Test to find out whether an order, including an order of remand, "affects the decision of the case" within the meaning of S. 105, cl. (1) of the Code.

Appeal under cl. 15 of the Letters Patent against the decision of the Hon'ble Mr. Justice Wallace in S. A. No. 672 of 1921 preferred to the High Court against the decree of the Court of the Subordinate Judge of Bapatla in A. S. No. 165 of 1920 preferred against the decree of the Court of the District Munsif of Ongole in O. S. No. 321 of 1916.

*L P A No. 178 of 1925. 19th March, 1926.

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Ch. Raghava Rao for appellant.

V. Ramadoss for respondents.

The Judgment of the Court was delivered by

Madhavan Nair, J.

MADHAVAN NAIR, J. :—The plaintiff-appellant sued to establish his right to, and to recover possession of, the suit land on the ground that it formed part of the "Shroff-Service inam land" of the village. The defendants contended that questions relating to Shroff's Service are governed by Madras Act III of 1895 and that Civil Courts have no jurisdiction to try the suit. Accepting their contention the District Munsif returned the plaint for presentation to the Revenue Court. On appeal, the District Judge, holding that the suit is triable in a Civil Court, set aside the District Munsif's order and remanded the case to the Lower Court for disposal. The District Munsif then gave a decree to the plaintiff for possession of the suit lands and past profits. This decree was confirmed by the Subordinate Judge. In second appeal the question as regards the jurisdiction of the Civil Court to try the suit was once again raised and the learned Judge, Wallace, J., after calling for findings from the Lower Court, came to the conclusion that the subject-matter of the suit fell within the purview of Act III of 1895. He, therefore, set aside the decree of the Appellate Court and restored the original order of the District Munsif returning the plaint for presentation to the Revenue Court. This Letters Patent Appeal has been preferred against the decree passed in the Second Appeal setting aside the decree of the Lower Appellate Court.

The main argument of the appellant is that, since respondents (defendants) did not prefer an appeal against the order of remand passed by the District Judge, they are precluded, under S. 105, cl. 2 of the Civil Procedure Code, from disputing its validity in second appeal. This is met by the reply that the Code does not provide for an appeal against an order of remand of the nature passed by the District Judge in this case; and that the respondents can question the correctness of that order in proceedings in appeal under S. 105, cl. 1 of the Code. To this, the appellant rejoins by saying that, since the "remand order" does not "affect the decision of the case," the respondents cannot invoke the aid of such section. The questions arising for decision are : (1) Whether the order of remand passed by the District Judge in this case is appealable, and (2) whether the order, if not appealable,

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is an order affecting the decision of the case within the meaning of S. 105, cl. 1 of the Code.

The appellant relies on O. 43, R. 1, cl. (*u*) in support of his contention that the order of remand passed in this case is appealable. This argument cannot be accepted. Cl. (*u*) of R. 1 of O. 43 contemplates an appeal from an order of remand under R. 23 of O. 41. Rule 23 enables the Appellate Court to pass an order of remand in an appeal against a *decree* in a suit which has been disposed of on a preliminary point. In the case before us, the appeal before the District Judge was not against a *decree* but against an *order* passed by the District Munsif returning the plaint under R. 10 of O. 7. An appeal is provided against such an order under O. 43, R 1, cl. (*a*), and the order passed by the Appellate Court becomes final under S. 104, cl. (2). It follows that it was not open to the respondents to prefer an appeal against the order of remand passed by the District Judge. This conclusion is supported by the decisions in *Firm Bhawani Sahai-Kanshi Ram* v. *Firm Harbans Singh Gopal Das* (1), *Naubat Singh* v. *Baldeo Singh* (2) and *Nilkanth* v. *Balvant* (3). Section 105, cl. (2) did not, therefore, preclude the respondents from disputing the correctness of the remand order before the learned Judge in second appeal if they were otherwise entitled to do so.

The respondents rely on S. 105, cl. (1) in support of their right to re-open the question as regards the correctness of the remand order before the learned Judge. Section 105, cl. (1) provides that—

> "No appeal shall lie from any order made by a Court in the exercise of its original or appellate jurisdiction; but, where a decree is appealed from, any error, defect or irregularity in any order, affecting the decision of the case, may be set forth as a ground of objection in the memorandum of appeal."

The section applies to appealable orders. Applying that section, the remand order in this case could be objected to in second appeal if the order is one "affecting the decision of the case". Cases brought to our notice by the respondents show that the orders referred to in S. 105, cl. (1) refer to any erroneous order which affects the decision of the case on the merits or otherwise; while those referred to by the appellant show that the erroneous order must be an order affecting the decision of the case on the merits. It is unnecessary to

1. (1920) 68 I C 304. 2. (1911) I L R 33 A 479.
3. (1925) 27 Bom L R 635.

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enumerate these cases and discuss them in detail as all of them have been considered in a recent judgment by Wallace and Jackson, JJ. in *Athamsa Rowther* v. *Ganesan* (4) wherein the question arose as to whether an order setting aside the *ex parte* final decree in a mortgage suit, retaining the *ex parte* preliminary decree therein is an order affecting the decision of the case within the meaning of S. 105, cl. (1), Civil Procedure Code. In the course of their judgment, holding that the propriety of such an order can be challenged in appeal against the decree finally passed in the suit, the learned Judges, after referring to the cases now brought to our notice, make the following observation : " It is clear that, when the result of the setting aside of the order has been the hearing of the suit *de novo* on its merits, no injustice would be done to any one by the decision of the case and the final result is not affected. " Then referring to the merits of the case before them they state that, " So far from courting a decision on the merits he (defendant) is trying to burke such a decision altogether. In such circumstances we cannot but hold that an order setting aside the *ex parte* final decree while retaining the *ex parte* preliminary decree is an order ' affecting the decision of the case. ' " It seems to us that these observations made with reference to an order setting aside *ex parte* decrees may well be applied as tests in considering whether a remand order of the nature we are dealing with " affects the decision of the case " within the meaning of S. 105, cl. (1), Civil Procedure Code. Does the order in question lead to an enquiry and investigation of the case as a result of the enforcement, or does it prevent such an enquiry ? In the former case the final decision of the case is not affected merely by reason of the enquiry being held by one Judge rather than another, whereas in the latter the result is different. In arriving at a decision as to whether an interlocutory order affects the decision of the case within the meaning of S. 105, cl. (1), Civil Procedure Code, the nature of the order in relation to the facts of the particular case has to be considered. This is what can be gleaned from the decisions. Orders setting aside *ex parte* decrees may not, in very many cases, as held in *Chintamani Dasi* v. *Raghunath Sahoo* (5), *Gulab Kunwar* v. *Thakur Das* (6), *Tasadduq Hussain* v. *Hayat-un-nissa* (7) and *Sundar Singh* v. *Nighaiya* (8), be attacked in appeals in the suits; but if

4. (1924) 47 M L J 641.
5. (1895) I L R 22 C 981.
6. (1902) I L R 24 A 464.
7. (1903) I L R 25 A 280.
8. (1924) I L R 6 Lah 94.

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they are of the nature mentioned in *Gopala Chetti* v. *Subbier* (9) and *Athamsa Rowther* v. *Ganesan* (4) they will affect the decision of the case and can be challenged in appeal against the final decree.

In the present case the result of the enforcement of the remand order was the trial of the suit and an adjudication of the rights of the parties according to the merits. The eventual decision of the case is not affected by it and its propriety cannot, therefore, be questioned in second appeal under S. 105, cl. (1), Civil Procedure Code. We must therefore set aside the decision of the learned Judge and restore that of the Subordinate Judge with costs here and before the learned Judge.

A. S. V. *Appeal allowed.*

[FULL BENCH.]

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—SIR VICTOR MURRAY COUTTS TROTTER, *Chief Justice*, MR. JUSTICE KRISHNAN AND MR. JUSTICE BEASLEY.

The Commissioner of Income-tax, Madras ... *Referring Officer**

v.

Thevara Patasala by Manager Arunachalam Chettiar, Vriddachalam, South Arcot District ... *Assessee.*

F. B. — The Commissioner of Income-tax v. Thevara Patasala, Vriddachalam.

Trust—Creation of—Validity—Hindu joint family—Partition between—Agreement at, setting apart portion of family property for trust purpose—Effect—Right of members to resile from trust—Indian Income-tax Act XI of 1922, S. 4 (3) (1)—Income from "property held under trust"—Meaning—Forbidden investment by trustee—Profits of—Liability to assessment of—Trustee so investing liable to be assessed to tax and to pay costs of reference under S. 66 (2) of Income-tax Act.

A Hindu joint family entered into a partition and agreed among themselves that Rs. 15,000 of the family property should be set aside for a trust purpose, which purpose was to establish a Thevara Patasala, and that the income from the balance of the amount after erecting a building was to be used for the upkeep and carrying on of the school. The direction was that the balance was to be invested in the purchase of lands and that it was on the income arising from those lands the Patasala should be run.

Held, that there was a creation of a valid trust and one from which none of the parties or its members could possibly resile without committing a breach of trust.

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*R. C. No. 11 of 1925. 11th January, 1926.

4. (1924) 47 M L J 641, 9. (1903) I L R 26 M 604: 13 M L J 308.

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Instead of investing the balance after building the school in lands the trustees invested the same in a rice mill and they carried on there the business of milling rice and derived income from it.

Held further, that the income derived from the rice mill business was not income derived from "property held under trust" wholly for religious or charitable purposes within the meaning of S. 4 (3) (1) of the Indian Income-tax Act XI of 1922, and that the said income was liable to be taxed as being the profits of the business.

The manager was declared to be assessable and to be liable for the costs of the reference under S. 66 (2) of the Act including the pleader's fee.

If an institution which primarily exists for charitable purposes chooses to raise funds for those purposes by carrying on a business in competition with other persons who have to pay income-tax they like them will have to pay income-tax notwithstanding the fact that the ultimate surplus of the profits is all going to the charitable object.

Case referred under S. 66 (2) of the Indian Income-tax Act XI of 1922 by the Commissioner of Income-tax, Madras in his letter No. 524 of 1925 dated 22nd April, 1925 for the decision of the High Court, the following question :—

"Whether the income derived by the Thevara Patasala from its rice mill business is income derived from "property held under trust" within the meaning of S. 4 (3) (1) of the Indian Income-tax Act XI of 1922."

V. Ramaswami Aiyar for assessee.

M. Patanjali Sastri on behalf of the Referring Officer.

The Judgment of the Court was delivered by

Coutts Trotter, C. J.

The Chief Justice :—The facts in this case are quite sufficiently set out in the case stated by the Commissioner. and they are shortly these, that a Hindu joint family entered into a partition and agreed among themselves that Rs. 15,000 of the family property should be set aside for a trust purpose, which purpose was to establish a Thevara Patasala, that is, a school for teaching Hindus Tamil hymns, and that the income from the balance of the amount after erecting a building was to be used for the upkeep and carrying on of the school. The direction was that that balance was to be invested in the purchase of lands and that it was on the income arising from those lands the Patasala should be run. Now in these circumstances we entertain no doubt that there was a creation of a valid trust and one from which none of the parties or its members could possibly have resiled without committing a breach of trust. The question now arises in consequence of what the trustees did. Instead of investing the balance after building the school in lands they in some shape or form invested them in a rice mill—apparently they purchased it—and they carried on there the business of milling rice and derived income from it. The point

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taken by the Crown is that on that income they are liable to be taxed as being the profits of the business. It is quite clear to our minds that if they are the profits of a business they cannot at the same time be income derived from property held under trust wholly for religious or charitable purposes. The question was at first sight a little complicated by the fact which appears on the face of the document that this was a forbidden investment and that to put the money into this rice mill was a clear breach of trust on the part of the trustees. But the answer of the Crown appears to be on reflection that even assuming it to be a breach of trust, that is a matter which raises questions no doubt as between the *cesti qui trust* and the trustees and it may be that the trustees will not be able to charge the institution with any part of the profits that is taken from them by the Crown in the form of taxes. On that we express no opinion. But it does not in the least affect the position. The English authorities are quite clear that if an institution which primarily exists for charitable purposes chooses to raise funds for those purposes by carrying on a business in competition with other persons who have to pay income-tax, they like them will have to pay income-tax notwithstanding the fact that the ultimate surplus of the profits is all going to the charitable object. In our opinion, that is clearly laid down in the *Rotunda Hospital case* [*Common* v. *Governors of the Rotunda Hospital, Dublin* (1)] which has been followed in the subsequent cases, and only the other day in *In the matter of Lachman Das Narain Das* (2). We think that that principle applies quite clearly to the Indian Act as the Allahabad High Court hold and that the answer to this reference must be that the proceeds derived from the carrying on of this rice mill are assessable to income-tax. The person whom we declare to be assessable and whom we make to pay the costs of this reference including a pleader's fee of Rs.150 is the manager Arunachalam Chetty.

A. S. V. *Reference answered.*

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1. (1921) 1 A C 1. 2. (1924) I L R 47 A 68.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE PHILLIPS AND MR. JUSTICE MADHAVAN NAIR.

Sornam Pillai ... *Appellant** (*3rd respondent*)

v.

Tiruvazhiperumal Pillai and others ... *Respondents* (*Petitioner and Respondents Nos.* 1 & 2).

Sornam Pillai v. Tiruvazhiperumal Pillai.

Civil Procedure Code, S. 47—Appeal under—Decree-holder auction purchaser—Purchaser from—Proceeding between, and judgment-debtor relating to delivery of property—Order in—Appeal from—Limitation Act, Art. 180—Application for delivery—Limitation—Suit by judgment-debtor to set aside Court-sale—Period of pendency of—Deduction of—Right to.

Proceedings between a decree-holder who has purchased at Court auction and the judgment-debtor are proceedings relating to the execution, discharge and satisfaction of a decree within the meaning of S. 47, Civil Procedure Code. No distinction can be drawn in principle between such a case and a case where the proceedings are between a party who derives title from a decree-holder who has purchased at Court auction and the judgment-debtor.

There is no provision of law for excluding in favour of the auction purchaser applying for delivery of immoveable property purchased by him at a Court-sale the period of the pendency of a suit filed by the judgment-debtor to set aside the Court-sale.

Appeal against the order of the Court of the Subordinate Judge of Tuticorin dated the 10th day of May 1924 in A. S. No. 85 of 1923 preferred against the order of the Court of the Principal District Munsif of Srivaikuntam in E. A. No. 87 of 1923 in O. S. No. 507 of 1911.

V. Narayanan for appellant.

S. Varadachariar and *P. N. Marthandam Pillai* for respondents.

The Court delivered the following

JUDGMENT :—This Civil Miscellaneous Second Appeal arises out of an application in execution filed by the 1st respondent for delivery of the properties sold to him by the decree-holder who had herself purchased the properties in execution of a mortgage decree in O. S. No. 507 of 1911 on the file of the District Munsif's Court of Srivaikuntam. The Court sale was held on the 12th of September 1919 and was confirmed on the 15th of October, 1919. The 1st respondent who held a mortgage over the suit properties was not a party to O. S. No. 507 of 1911. Having obtained a decree on his mortgage in a suit in which the prior mortgagee-decree-holder was

*C. M. S. A. No. 80 of 1924. 26th February, 1926.

not impleaded as a party, he filed an application under O. 21, R. 90 of the Civil Procedure Code to set aside the Court sale on the 15th October, 1919. That application was dismissed on the same date. A day after the aforesaid Court sale and two days before the said application, the 1st respondent instituted O. S. No. 494 of 1919 on the file of the District Munsif's Court of Srivaikuntam praying for the setting aside of the Court sale in O. S. No. 507 of 1911 after declaring that the decree in that suit was not binding upon him. The said suit was eventually dismissed on the 27th of November, 1922. In the meantime he purchased the suit properties from the decree-holder in O. S. No. 507 of 1911 and presented the application which has given rise to this appeal on the 24th of January, 1923 for delivery of the properties to him.

The appellant is one of the sons of the mortgagor. He contended that the execution application was barred by limitation under Art. 180 of the Limitation Act. Accepting that contention the first Court held that, since the application dated 24th of January, 1923 was not made within three years of the date when the Court sale had become absolute on the 15th of October, 1919 as required by that article, it was time barred and dismissed it. On appeal by the 1st respondent, the learned Subordinate Judge set aside that decision holding that the 1st respondent was entitled in computing the period of limitation under Art. 180, to deduct in his favour the period during which O. S. No. 494 of 1919 (renumbered as O. S. No. 118) was pending on the file of the Additional District Munsif's Court at Tinnevelly, as the cause of action for delivery of properties was suspended during that period, *i. e.*, from the 13th October, 1919 to the 27th of November, 1922.

It is urged before us that the Subordinate Judge's decision should be set aside because (1) no appeal lay to the Lower Court under S. 47 of the Code of Civil Procedure, and (2) under Art. 180 of the Limitation Act the respondent is not entitled to deduct in his favour the period from the 13th of October, 1919 to the 22nd November, 1922.

As regards the first point, the argument advanced is that (*a*) the right of the respondent to recover possession of the land is not a question relating to the execution, discharge and satisfaction of a decree, and (*b*) if it is, that the question does not arise between the parties to the suit or their representatives.

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In *Sandhu Taraganar* v. *Hussain Sahib* (1), following the previous decisions of this Court, it was held that the proceedings between a decree-holder who has purchased at Court auction and the judgment-debtor are proceedings relating to the execution, discharge and satisfaction of the decree and no distinction can be drawn in principle between such a case and one like the present where the proceedings are between a party who derives title from a decree-holder who has purchased at Court auction and a judgment-debtor. It was also held in that case that the purchaser from the decree-holder who has purchased at Court auction is a representative of the decree-holder within the meaning of S. 47 of the Civil Procedure Code. If that decision lays down the law correctly, then it must be held that under S. 47 of the Civil Procedure Code an appeal lay to the Lower Court in this case, but it is argued that, in view of the Full Bench decision in *Veyindramuthu Pillai* v. *Maya Nadan* (2), the decision in *Sandhu Taraganar* v. *Hussain Sahib* (1) should no longer be followed. This argument cannot be accepted. In discussing the "representative character" of the various kinds of purchasers at a Court sale referred to in the three questions submitted to the Full Bench, the learned Judges Abdur Rahim and Oldfield, JJ., proceed on the assumption that the question that arose in that case related to execution, discharge and satisfaction of a decree within the meaning of S. 47 (*see* pages 116 and 128) and nothing contrary to that assumption appears in the judgment of Seshagiri Aiyar, J. The first question decided in *Sandhu Taraganar* v. *Hussain Sahib* (1) was thus left untouched in the Full Bench decision. As regards the second question, it was no doubt raised in the second point referred to the Full Bench, but we are not able to say from the discussion of it in the judgments that the decision in *Sandhu Taraganar* v. *Hussain Sahib* (1) on this point has been overruled by the Full Bench though it is fairly clear that the opinions of Oldfield and Seshagiri Aiyar, JJ. lend some support to the appellant's argument. The decision in *Jainulabdin Sahib* v. *Krishna Chettiar* (3) following the Full Bench does not help to make the point clearer and does not refer to the decision in *Sandhu Taraganar* v. *Hussain Sahib* (1). In this state of authorities, we feel bound to follow the rule of procedure laid

1. (1904) I L R 28 M 87 at 89: 14 M L J 474
2. (1919) I L R 43 M 107: 38 M L J 32 (F B).
3. (1921) 41 M L J 120.

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down in the decision in *Sandhu Taraganar* v. *Hussain Sahib* (1) and hold that an appeal lay to the Lower Court against the District Munsif's order under S. 47 of the Civil Procedure Code.

The second argument relates to the question of limitation under Art. 180 of the Limitation Act. That article prescribes "three years" from the time "*when the sale becomes absolute*" as the period of limitation for a purchaser of immoveable property at a sale in execution of a decree to apply for delivery of possession. In this case the application filed by the first respondent under O. 21, R. 90 to set aside the auction sale having been dismissed the sale became *absolute* on the 15th of October, 1919, and, therefore, the application for delivery, dated the 24th of January, 1923, is barred under Art. 180. But it is urged on the strength of the decision in *Muthu Korakkai Chetti* v. *Madar Ammal* (4) that the appellant is entitled to deduct in his favour the period during which O. S. No. 494 of 1919 was pending in the Court, in which case, his application would be within time. In our opinion the principle of that decision is inapplicable to the present case. In *Muthu Korakkai Chetti* v. *Madar Ammal* (4) the period allowed to be deducted in favour of the execution purchaser applying for execution was the time during which the application under O. 21, R. 90 to set aside the Court sale was pending in the Court and it was held that the sale did not become *absolute* within the meaning of Art. 180 until the application to set aside the sale had been disallowed and the sale upheld, although an order confirming the sale had been passed before the application to set aside the sale was made. In the case before us, as already pointed out, the application allowed by the Code to set aside the sale was made by the first respondent and dismissed on the 15th of October, 1919, and the sale had, therefore, become absolute on that date under R. 92 of the Code and within the meaning of the third column of Art. 180 of the Limitation Act. There is no provision of law for excluding in favour of the auction-purchaser the period of the pendency of a suit filed by the judgment-debtor to set aside a Court sale which is what is claimed in this case on behalf of the first respondent. Time having begun to run against him from the 15th October, 1919, the application for delivery of possession

1. (1904) I L R 28 M 87 at 89: 14 M L J 474.
4. (1919) I L R 43 M 185: 38 M L J 1 (F B).

Sornam Pillai v. Tiruvazhi-perumal Pillai.

filed on the 24th of January, 1923, is time-barred and must be dismissed.

The order of the learned Subordinate Judge is set aside and that of the District Munsif is restored with costs here and in the Court below.

A. S. V. *Appeal allowed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—SIR VICTOR MURRAY COUTTS TROTTER, *Chief Justice* AND MR. JUSTICE RAMESAM.

K. Doraiswami Chetty ... *Appellant* (Insolvent)*

v.

The Official Assignee of Madras ... *Respondent.*

Doraiswami Chetty v The Official Assignee of Madras.

Insolvency Rules, O. 3, R. 26—Order of adjudication—Service upon insolvent—Necessity—Knowledge of order on part of insolvent if enough.

In a case in which notice of the order of adjudication was not served upon the insolvent, *held,* that the mere fact that he knew all about the adjudication would not make him a person who had in effect had service of the order within the meaning of R. 26 of O. 3 of the Insolvency Rules.

On Appeal from the judgment of the Hon'ble Mr. Justice Beasley dated 13th July, 1925 and passed in the exercise of the Original Insolvency Jurisdiction of the High Court in Application No. 126 of 1925 in I. P. No. 316 of 1923.

P. Jagannatha Rao Naidu for appellant.

The Official Assignee of Madras for respondents.

The Court delivered the following

JUDGMENT:—Rule 26, O. 3 of the Insolvency Rules runs as follows:—

"If an order of adjudication is made without service of the petition, the debtor may, within 8 days after service of the order, or such further time as may be allowed by the Court, apply by notice of motion supported by affidavit to annul the order."

In this case no notice of the order of adjudication was given to the insolvent at all. This application was not made within eight days, nor was any question raised as to allowing him further time. The learned Judge has held that the insolvent, who knew all about the adjudication, must be taken as a person who had in effect had service of the order. We do not think that that is a construction of the rule which can be supported. Had it been so intended words such as "or after the order had been brought to his knowledge" after "service of the order" could easily have been added, and no such words are found. We

*O S Appeal No 64 of 1925. 4th February, 1926.

therefore order that the case be remanded and dealt with on the merits. The appellant will have the costs of this appeal in any event and the costs of the other proceedings will be in the discretion of the learned Judge.

Doraiswami Chetty *v.* The Official Assignee of Madras.

A. S. V. *Case remanded.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—MR. JUSTICE ODGERS.

Lomada Pedda Subbayya ... *Appellant** (*1st deft.*)

v.

Sattipalli Ramayya and others ... *Respondents* (*Plaintiffs* 1 *and* 3 *and defendants* 2 *to* 5).

Subbayya *v.* Ramayya.

Remand order—Point dealt with by—Inam lands—Suit to recover—Issue as to whether they are service inams and Civil Court has jurisdiction to entertain suit in respect of same—Decision of Munsif against plaintiff—Appeal from—Decision of Appellate Court reversing Munsif and remanding suit—Point dealt with by remand order, in [illegible]e of—Inam—Village service inam—What constitutes—Devadayam inams—Alienability and heritability of.

In a suit for the recovery of certain inam lands, the first issue raised was "whether the lands in dispute are service inams, and whether this Court has no jurisdiction to entertain a suit with respect to the same"; and the second issue was "whether the alienation of the lands in favour of the plaintiffs was void and not enforceable under S. 5 of Act III of 1895. On the first issue the Munsif held that he had no jurisdiction to try the suit as the matter fell within the purview of S. 21 of Act III of 1895. On appeal, the District Judge found that the lands in question were service inams governed by Act III of 1895; but held that, as the plaintiffs did not rely on any right to an office or its emoluments, the Civil Court had jurisdiction to entertain the suit, and remanded the suit for disposal according to law. On remand, the Munsif held that the suit inams were village service inams covered by Act III of 1895 and that the alienation thereof in favour of the plaintiffs was void and not enforceable under S. 5 of Act III of 1895 (the subject of the second issue). On appeal the Sub-Judge held that the inams were village service inams, but that they were Devadayam permanent hereditary inams and were alienable. He therefore decreed in favour of the plaintiffs. On second appeal preferred from the Sub-Judge's decree, *held*, that the finding as to the character of the inams would no doubt be a finding on a preliminary point, but that, as the preliminary point dealt with by the remand order of the District Judge was as to jurisdiction, the Sub-Judge was not precluded by that order from considering the character of the inams.

Held further, that the suit inams were Devadayam inams and that they were neither alienable nor heritable.

Quaere: Whether the service of reciting hymns can be said to be a village service?

Second Appeal against the decree of the Court of the Temporary Subordinate Judge of Cuddappah in A.S.No. 38 of

*S A No. 10 of 1924. 27th March, 1925.

Subbayya v. Ramayya.

1923 (A. S. No. 156 of 1922 on the file of the District Court of Cuddappah) preferred against the decree of the Court of the District Munsif of Proddattur in O. S. No. 633 of 1920.

K. Y. Adiga for appellant.

V. C. Seshachariar for respondents.

The Court delivered the following

JUDGMENT:—This is a case of some little difficulty as the materials appear to me to be somewhat slender. The plaintiffs sued for certain inam lands claiming under the 5th defendant. The 1st defendant was in possession of these lands under a lease from defendants 3 and 4. When the case was first tried, the first District Munsif held that he had no jurisdiction to try the suit as the matter fell within the purview of S. 21 of Act III of 1895. This was on the first issue as to "whether the lands in dispute are service inams, and whether this Court has no jurisdiction to entertain a suit with respect to the same". The learned District Judge considered both these points and found that the lands in question were service inams governed by Act III of 1895; and as the plaintiffs in the suit did not rely on any right to an office or its emoluments, the Civil Court had jurisdiction to entertain the suit, and remanded the suit to the District Munsif for disposal according to law. On the suit coming on again before the District Munsif he observed that the suit inams were village service inams covered by Act III of 1895 and that they were granted to the inamdar for reciting Sadulu on the occasion of the festival of the village goddess. The District Munsif came to the conclusion that the alienation in favour of the plaintiffs was void and not enforceable under S. 5 of Act III of 1895 which was the subject of the second issue. In the judgment under appeal the learned Subordinate Judge has held disagreeing with the District Judge remanding the suit that they were village service inams. He thought the lands were not attached to any temple and that the inamdar could in no sense be called a temple servant, but he held that the lands were Devadayam permanent hereditary inams and were alienable. He therefore decreed in favour of the plaintiffs.

On Second Appeal the first point taken is that the Subordinate Judge had no jurisdiction to review the finding of the District Judge in his order of remand as to the character of those inams. As has been seen, the character of the inams and the jurisdiction of the Court to entertain the suit are made the subject of the same issue, viz., the first. It is said that

the plaintiffs had the opportunity to appeal against so much of the finding of the District Judge as determines the character of the inams, and that, not having done so, he is now concluded by that finding, it being a finding on a preliminary point. This I think it is ; and *Balvant Ramchandra* v. *Secretary of State for India* (1), *Subbalakshmamma* v. *Venkatrayudu* (2) and *Latchumammal* v. *Gangammal* (3) may be referred to as authorities for the position taken up. I think, however, that what the Subordinate Judge really intended to do and the important part of his remand order is the finding as to jurisdiction and I think that the case reported in *Ramaswami Reddi* v. *Marudai Reddi* (4) is authority for his position. The preliminary point was really whether the Court had jurisdiction to entertain the suit. That stood in *limine* and that is what I think was intended to be found by the Subordinate Judge. Therefore I think the first point for the appellant must fail.

The second point is that the lands are hereditary village service inams and so alienable. I am not at present prepared to say that this service of reciting hymns can be said to be a village service. The District Judge in his order of remand does observe that the Asadi is a village servant of considerable importance. The Inam Register, Ex. B, regards this land as a permanent inam for the service of telling Sadulu in the festival of Gramadevata at Kallur "now rendered," and it is confirmed under Rule 3 of the Board's Standing Orders, which refers to an inam for religious or charitable objects. The Village Register, Ex. A, refers to the inam as devadayam granted for chanting hymns at the time of the festival of the village deity. I find some difficulty in saying that a person who performs a service of this character falls within the purview of S. 3, sub-section 4 of the Act III of 1895 although of course the list given is not exhaustive. Mr. V. C. Seshachari for the plaintiffs does not contend that the lands are Devadayam. His contention is that they are the personal inams of the holder of this office; and that apparently his argument is that he is entitled to do what he likes with them. The matter is not free from doubt. But I have the finding of the Subordinate Judge and to a certain extent I have the support of the Inam Register as to the character of this inam and I do not see any sufficient reason to hold that they are clearly not Devadayam inams in spite of Mr. Adiga's contention that they not only

1. (1908) I L R 32 Bom 432. 2. (1908) I L R 32 M 318.
3. (1910) I L R 34 M 72. 4. (1923) I L R 47 M 453: 46 M L J 198.

Subbayya v. Ramayya.

fall under S. 3 of Act III of 1895 but under Standing Order 55 of the Board's Standing Orders as temple service inams.

The third point taken is that the Subordinate Judge is wrong in holding that, even if these lands are Devadayam, they are heritable. I take it that *prima facie* they are not. The only reason given by the Subordinate Judge as to why these lands are heritable is that there have been certain alienations of them which were not objected to either by the villagers or by Government. The alienations set out are that the lands were given to the 5th defendant by his maternal grandfather by Ex. C in 1908 and the defendants 3 and 4 gave a long lease of the lands under Exs. C and F in 1911 and 1916. It does not seem to me that this is a conclusive reason for holding that the lands which are granted for the performance of a definite service are alienable. There is the Full Bench case reported in *Anjaneyalu* v. *Sri Venugopala Rice Mill, Ltd.* (5) against the view taken by the Subordinate Judge. That was an inam for service in a temple and what little evidence there is in the present case is that of P. W. 1 who says that the inams were given for chanting hymns in temples. It was held in the above case that alienation of such lands is opposed to public policy and the nature of the interest affected. The authorities were all considered at some length and the Standing Order 54 of the Board of Revenue which is referred to as probably relating to the inams under discussion by the Subordinate Judge is noticed in the judgment of the ex-Chief Justice. My opinion therefore is that the learned Subordinate Judge is wrong on this point. I think the lands are probably rightly classed as Devadayam inams and I think that being such, they are under the authority of the Full Bench ruling inalienable. The decree of the Subordinate Judge must, therefore, be set aside and the suit dismissed with costs throughout.

A. S. V. *Appeal allowed.*

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5. (1922) I L R 45 M 620: 42 M L J 477 (F B).

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE PHILLIPS AND MR. JUSTICE MADHAVAN NAIR.

Arukapalli Narasimha Rao and another ... *Appellants* in A. A. A. O. No.* 17 *of* 1925 *and petitioners in C. M. P. No.* 1064 *of* 1925 (*Respondents* 2 *and* 3 *and 2nd counter-petitioner*)

v.

Arumilli Subbarayudu and another ... *Respondents in do. and respondents in do.* (*Appellant, 1st respondent—Petitioner and 1st counter-petitioner*).

Narasimha Rao *v.* Subbarayudu.

Civil Procedure Code, O. 21, R. 66—Order under—Judicial or administrative—Appeal against order—Right of—Order coming under S. 47 and order not coming under that section—Distinction—Mortgaged property—Sale of, in execution—Order in which sale is to be held—Order as to—Appeal against—Question as to order of sale decided against party in suit—Question if may be raised by him again in execution proceedings.

An order under O. 21, R. 66, Civil Procedure Code, directing the sale of mortgaged property in a particular order is of a judicial and not a mere administrative character.

Not every order under O. 21, R. 66 is appealable. But an appeal lies against an order passed under that rule if it comes under S. 47 of the Code.

A question between the purchaser who has been subrogated to the rights of the prior mortgagee and the mortgagor relating to the sale of their respective properties is one which relates to the execution of the decree and arises between the parties to that decree. An order deciding that question comes under S. 47, and an appeal therefore lies against it.

The fact that the question as to the order in which the mortgaged property is to be sold has been decided against a party in the suit itself is no bar to his raising the question again in the execution proceedings.

Appeal against the order of the Court of the Subordinate Judge of Amalapuram, dated 25th August, 1924, in A. S. No. 2 of 1924 preferred against the order of the Court of the District Munsif of Razole in E. A. No. 601 of 1923 in O. S. No. 89 of 1914 on the file of the Temporary Sub-Court, Rajahmundry (O. S. No. 29 of 1914 on the file of the District Court of Godavari at Rajahmundry).

K. Ramamurthi for appellant.

G. Lakshmanna and *A. Satyanarayana* for respondents.

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*A. A. A. O. No. 17 of 1925 and C. M. P. No. 1064 of 1925.

4th February, 1926.

Narasimha Rao v. Subbarayudu.

The Court delivered the following

JUDGMENTS :—*A. A. A. O. No.* 17 *of* 1925 :—This is an appeal against the appellate order of the Subordinate Judge directing the sale of mortgage property in a certain particular order. By this order he altered the order of the District Munsif who had directed the property to be sold in a different order. The first contention raised in this second appeal is that no appeal lay to the Subordinate Judge as the District Munsif's order was one passed under O. 21, R. 66. This rule corresponds to S. 287 of the Civil Procedure Code of 1882 and it was held by a Full Bench of this Court in *Sivagami Achi* v. *Subramania Aiyar* (1) that proceedings under that section are of an administrative and not a judicial character and that therefore no appeal would lie from a decision thereunder. The facts concerned in that reference—and the Full Bench agreed in the reasons given in the order of reference—were that orders had been passed fixing the market value of the property, the place of sale, the lots in which it was to be sold and the amount of the mortgage money and on these facts it was held that no appeal would lie against an order under S. 287. That case dissented from the case in *Ganga Prasad* v. *Raj Coomar Singh* (2) and a prior Madras decision in *Sivaswami Naicker* v. *Ratnaswami Naicker* (3), and since that case was decided, the legislature has altered the Code to a certain extent. Rule 66 of O. 21 is the new corresponding section, and in the new Code there is a provision that before a proclamation is drawn up notice shall be given to the decree-holder and the judgment-debtor. This looks as if attention had been paid to the difference of opinion between the Calcutta and the Madras High Courts and that it was thought fit to enter this provision which is in effect a provision to enable the parties to be heard before a decision is arrived at. It certainly looks as if the legislature intended to constitute such decisions as being of a judicial nature, as also the fact that the old S. 287, which is relied on in *Sivagami Achi* v. *Subramania Aiyar* (1) has been altogether removed. It is not necessary here, therefore, to discuss the Full Bench decision, by which we would be bound if the law were still the same. Since the passing of the new Code in 1908 there have been two decisions of this Court on this question [*Mangayya* v. *Sriramulu* (4) and *Vedavyasa Aiyar* v. *The Madura Hindu Labha Nidhi*,

1. (1903) I L R 27 M 259: 14 M L J 57 (F B). 2. (1903) I L R 30 C 617.
3. (1900) I L R 23 M 568: 10 M L J 314. 4. (1913) 24 M L J 477.

Ltd. (5)]. In both these cases, which are analogous to the present one, it was held that an appeal lay because the order passed was one which came under the provisions of S. 47 of the Code. It is not, however, every order under R. 66 that would be appealable, because no right of appeal is specially given against orders under that rule, but if any such order is passed such as would come under S. 47, there is no reason why effect should not be given to the provision that all orders under S. 47 are appealable. In the present case there is a question at issue between the purchaser who has been subrogated to the rights of the prior mortgagee and the mortgagor and that question at issue relates to the sale of their respective properties and may have a very important consequence to the parties. It is certainly a question which relates to the execution of the decree, and it arises between the parties to that decree. It would therefore come under S. 47 and it would not be right to deny the parties their ordinary right of appeal in such a matter. There is one case to the contrary—*Lanka Rama Naidu* v. *Lanka Ramakrishna Naidu* (6)—but that expressly differentiates the case in *Vedavyasa Aiyar* v. *The Madura Hindu Labha Nidhi, Ltd.* (5), and consequently when it is read as applying only to its own facts it is not really an authority against the view we now take.

Narasimha Rao v. Subbarayudu.

The question whether *Sivagami Achi* v. *Subramania Aiyar* (1) is still good law has been considered in *Kaveribai Ammal* v. *Mehta and Sons* (7) and without entering deeply into the question the learned Judges have expressed an opinion that in view of the change in the law it may require re-consideration. As the circumstances of this case are different and there is authority to support us, we do not think it is necessary to refer the question to a Full Bench.

Coming to the merits of the case, it is argued that because the relief which the 4th defendant has now obtained was asked for in the suit itself and not granted, it was not open to the Lower Courts to grant him the relief in execution. The point has been expressly decided in *Raghavachariar* v. *Krishna Reddi* (8) and we see no reason for not accepting that authority. On the merits of the case the Lower Appellate Court's decision is binding, as the order has been passed in the exercise of its discretion and it has not been shown that that discretion

1. (1903) I L R 27 M 259: 14 M L J 57 (F B).
5. (1923) 45 M L J 478. 6. (1923) 46 M L J 192.
7. (1923) 46 M L J 71. 8. (1923) 46 M L J 32.

Narasimha Rao v. Subbarayudu.

has not been exercised judicially. The second appeal therefore fails and is dismissed with costs of the 4th defendant.

C. M. P. No. 1064 of 1925 must also be dismissed with costs of the plaintiff (decree-holder).

A. S. V. *Appeal dismissed.*

[FULL BENCH]

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—SIR MURRAY COUTTS TROTTER, *Chief Justice*, MR. JUSTICE KRISHNAN AND MR. JUSTICE BEASLEY.

In re A. V. P. M. R. M. Murugappa Chettiar ... *Assessee**

F. B. — Murugappa Chettiar *In re*

Income-tax—Company with branches abroad—Remittances by a branch to the headquarters—Nature of—Profits or capital—Presumption as to—Onus on assessee to show that it was capital.

In the case of a firm having its headquarters in British India and branches abroad, where money is remitted by a branch to the headquarters, the presumption is that the remittance represents profits. The burden of proof is on the assessee to show that it is otherwise.

Application under S. 45 of the Specific Relief Act I of 1877 and S. 66 of the Income-tax Act XI of 1922 for an order requiring the Commissioner of Income-tax to refer to the High Court the question of law arising in the matter of assessing the petitioner to income-tax.

M. Subbaraya Aiyar for assessee.

M. Patanjali Sastri for the Commissioner of Income-tax.

The Court delivered the following

JUDGMENT:—The difficulty in this case has entirely arisen owing to the ambiguity in the language used by the Commissioner in passing his order on the petition. The second paragraph of his order was on the face of it capable of the construction that he had held in the circumstances of this case, that where any sum of money passed from a foreign business to the headquarters of the firm in British India it must be regarded as profits and that no evidence was admissible to show that in fact it was something else. We are satisfied that the Commissioner did not mean to say that, but merely meant to say that he thought that where money was remitted from abroad to the headquarters in British India, the natural inference would be that such remittances came out of profits rather than capital until the contrary was shown by the assessee. The

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*28th September, 1925.

F. B.

Murugappa Chettiar *In re.*

claim here was that a large portion of the amount remitted from Seranda to Karaikudi was a repayment of capital lent long years before or at any rate was profits outside the three years' limit which would not under the law be assessable in British India. The Commissioner heard this contention and was not satisfied that the assessee had made out his case and he was entitled to take that view. That the *onus* of proof rested upon the assessee appears to be amply borne out by the case of *Scottish Provident Institution* v. *Allan* (1). That was a case of a Scottish Insurance Company, with branches in Australia, and in dealing with the question whether remittances from Australia to the Head Office in Scotland were assessable to income-tax, Lord Halsbury uses the following language :—

> "The next question is, whether or not, though earned abroad, the profits have been brought to this country. Here is a large sum sent back. Putting these two items together, they must include, and obviously do include, a large amount of profits. It is for the company to show, if the fact be so, that that remittance ought to be subject to a certain amount of deduction, because a good deal of it was repayment of that which was, in truth, capital and not profit at all."

The presumption that the Commissioner made in this case, viz., that *prima facie* all remittances were to be regarded as profits and that the burden of proof was cast upon the assessee to show the contrary, seems to be amply warranted by the authority of that case. As the Commissioner did not misdirect himself the only questions in the case that remain are purely questions of fact and so long as he has approached them without any misconception in his mind as to how they should be dealt with, his findings are conclusive.

The application will be dismissed with costs, Rs. 150.

T. S. V. ——— *Application dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—MR. JUSTICE DEVADOSS AND MR. JUSTICE WALLER.

Chidambara Thevar ... *Appellant** (*6th respondent, 6th defendant*)

v.

Subbarayar ... *Respondent* (*Petitioner—Assignee, decree-holder*).

Chidambara Thevar *v.* Subbarayar.

Civil Procedure Code, O. 21, R. 16, Proviso 2—Decree for payment of money—Mortgage decree if a—Old and new Codes—Distinction.

*A. A. A. O. No. 91 of 1924. 13th November, 1925.

1. (1903) A C 129.

Chidambara Thevar v. Subbarayar.

A mortgage decree is not a decree for the payment of money within the meaning of the 2nd proviso to R. 16 of O. 21, Civil Procedure Code.

Under the present Code, till a personal decree is given, it cannot be said that the decree is one for the payment of money.

Distinction between the old and the new Codes.

Appeal against the appellate order of the District Court of East Tanjore at Negapatam in A. S. No. 396 of 1923 preferred against the order of the Court of the District Munsif of Tiruturaipundi in M. A. No. 300 of 1923 in O.S.No.248 of 1917.

A. V. Viswanatha Sastri for appellant.

C. Padmanabha Aiyangar for respondent.

The Judgment of the Court was delivered by

Devadoss, J.

DEVADOSS, J.:—The only question in this appeal is whether a mortgage decree is a decree for payment of money within the meaning of the expression in O. 21, R. 16, Civil Procedure Code. The appellant is the 6th defendant in O. S. No. 248 of 1917, a suit brought on a mortgage. The 6th defendant bought a portion of hypotheca and the rest of the property was purchased by one Arunachalam Chetty. One Subbarayar obtained a transfer of the mortgage decree and applied to the Court to be recognised as a transferee decree-holder and for execution of the decree. The 6th defendant opposed the application on the ground that Subbarayar was a benamidar for Arunachalam Chetti and that under the 2nd proviso to O. 21, R. 16 he was not entitled to execute the decree. The District Munsif held that it was not proved that Subbarayar was benamidar for Arunachalam Chetti. The appeal of the 6th defendant was dismissed by the District Judge. He has preferred this appeal and the contention of Mr. Viswanatha Sastri for the appellant is that inasmuch as Arunachalam Chetti purchased a portion of the hypotheca subject to the mortgage, he is a judgment-debtor and the assignment in favour of Subbarayar being benami, for him he is not entitled to execute the decree against a co-defendant.

Granting for arguments sake that Subbarayar is a benamidar for Arunachalam Chetti the question is, is Arunachalam Chetti prevented from executing the decree against the 6th defendant? The question is a simple one. Is a mortgage decree, a decree for payment of money within the meaning of the 2nd proviso to O. 21, R. 16? According to the proviso "Where a decree for payment of money against two or more persons has been transferred to one of them, it should not be

executed against the others." We are unable to uphold the contention that a mortgage decree is a decree for the payment of money within the meaning of the proviso. A good deal of argument of Mr. Viswanatha Sastri was based upon *Abdulla Saheb* v. *Doctor Oosman Saheb* (1) and other cases which were decided before the passing of the present Civil Procedure Code. Under the present Procedure Code a preliminary decree is drawn up and time is given for redemption and if within the given time, money is not paid, a final decree, or a decree absolute is passed and the mortgaged property is brought to sale and if the proceeds of the sale are not sufficient to pay up the amount of the decree and if the personal remedy is outstanding a decree is given personally against the mortgagor. Till a personal decree is given, it cannot be said that the decree is one for the payment of money.

Under the old Civil Procedure Code a mortgage decree directed the payment of money and in default of payment that the property was to be sold. According to Form No. 129 time was given to the defendant to pay the principal and interest and costs within six months and in default of the defendant paying into Court such principal, etc., by the time given it was ordered that the mortgaged property should be sold and it was further provided that in case the sale proceeds of the mortgaged property did not cover the decree amount the judgment-creditor could recover the amount personally or from other property of the mortgagor. Under the old Code, therefore, a mortgage decree could be considered as a decree primarily for the payment of money. *Abdulla Saheb* v. *Doctor Oosman Saheb* (1) and the other cases which were decided under the old Code have no application to a mortgage decree passed under the present Code. Even when the old Code was in force, the Calcutta High Court consistently held the view that a mortgage decree was not a decree for money. In *Laldhari Singh* v. *Manager, Court of Wards, Bhapatpura Estate* (2) Mr. Justice Mukerjee after an exhaustive examination of the cases on the point held that a decree for sale of the mortgaged property could not be deemed as a decree for money within the meaning of S. 232 of the Code of 1882. A decree for redemption though it contains a provision for payment of money cannot be said to be a decree for money nor can a foreclosure decree in which a provision is made for the payment of money within the time

1. (1904) I L R 28 M 224. 2. (1911) 14 C L J 639.

Chidambara Thevar v. Subbarayar.

Devadoss, J.

fixed be a decree for payment of money. Where a decree is passed for the delivery of a specific moveable property, and in default, to pay a certain sum of money it is not primarily a decree for money.

In a mortgage decree the property is to be proceeded against in the first instance and the decree is therefore primarily against the property mortgaged. If a personal remedy is not outstanding the only remedy of the mortgagee decree-holder is to proceed against the property and the mere fact that a personal remedy is outstanding will not convert the mortgage decree into a decree for payment of money within the meaning of proviso to R. 16 of O. 21. The case *Sadagopa Aiyangar* v. *Sellammal* (3) does not help the appellant. In that case Mr. Justice Spencer and Mr. Justice Venkatasubba Rao held, "the expression 'decree for money against several persons in O. 21, R. 16' is not restricted to a personal decree for money against two or more defendants." The decree directed the defendant to pay the amount out of his family properties, and the learned Judges held "that the fact that the defendant was directed by the decree to pay the amount out of his family properties does not make the decree any the less a decree for payment of money against him." If a trustee is directed to pay money or an executor is directed to pay money, though he is not personally liable to pay the amount, it is still a decree for the payment of money." But that is quite a different thing from a mortgage decree which directs that the mortgaged properties should be sold to discharge the debt.

In S. 232 of the Code of 1882 the expression was "decree for money." In the present O. 21, R. 16, the expression is "decree for the payment of money." The words "the payment of" were evidently introduced to make the meaning clear.

We have no hesitation in holding that a mortgage decree is not a decree for the payment of money within the meaning of the 2nd proviso to R. 16 of O. 21.

The appeal therefore fails and is dismissed with costs.

A. S. V. *Appeal dismissed.*

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3. (1922) 43 M L J 761.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE DEVADOSS AND MR. JUSTICE WALLER.

Srinivasa Aiyangar ... *Appellant** (*L. R. of the plaintiff*)

v.

Vellayan Ambalam ... *Respondent* (*Defendant in do.*).

Srinivasa Aiyangar *v.* Vellayan Ambalam.

Limitation Act, Arts. 137, 138—*Applicability—Auction-purchaser of property—Mortgage usufructuary of property pending attachment—Effect of—Purchase by auction purchaser subject to mortgage or free from it—Remedy of auction purchaser against mortgagee—Suit for possession and not suit for redemption—Limitation for suit for possession.*

The suit property belonged to one *V*. It was sold in Court auction on 13th July, 1891 in execution of a Small Cause decree obtained against him and was purchased by the predecessor-in-title of the appellant. The sale was confirmed on 14th September, 1891. The property was attached before sale and, during the pendency of the attachment, it was mortgaged on 15th June, 1891 by *V* to the predecessor-in-title of the defendant. On 4th April, 1918 the appellant brought the suit out of which the appeal arose for redemption of the mortgage on the ground that the defendant was only a mortgagee and that he being the owner of the equity of redemption was entitled to redeem the property. The mortgage of 15th June, 1891 was a usufructuary mortgage for a term of five years, so that the term expired on 15th June, 1896.

Held, that when the auction purchaser purchased the property he purchased it free of the mortgage of 15th June, 1891 and the relationship of mortgagor and mortgagee did not subsist between the predecessor-in-title of the appellant or the appellant and the mortgagee, that the remedy of the auction purchaser, who obtained only symbolical delivery of the property, was to sue for possession, that the proper article of limitation applicable to the case was Art. 138 of the Limitation Act, and that the suit was barred thereunder.

Held that, assuming that Art. 137 of the Limitation Act was applicable to the case, the suit should have been brought within 12 years of the date when the judgment-debtor was entitled to possession, viz, 15th June, 1896, the date of the expiry of the term fixed by the mortgage of 15th June, 1891, and that the suit brought more than 12 years from that date was barred.

Appeal under cl. 15 of the Letters Patent against the judgment of the Hon'ble Mr. Justice Madhavan Nair dated the 19th day of September, 1924 in S. A. No. 404 of 1922† preferred to the High Court against the decree of the Court of the Subordinate Judge of Ramnad at Madura in A. S. No. 14 of 1921 (A. S. No. 568 of 1919, District Court, Ramnad) preferred against the decree of the Court of the District Munsif of Manamadura in O. S. No. 97 of 1918.

K. Bhashyam Aiyangar for appellant.

T. V. Muthukrishna Aiyar for respondent.

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*L P A No. 176 of 1924. 20th January, 1926.

†Reported in (1924) 47 M L J 913.

Srinivasa Aiyangar v. Vellayan Ambalam.

The Court delivered the following

JUDGMENT:—The suit property belonged to one Venkataranganadha Naicker. It was sold in Court auction on the 13th of July, 1891 in execution of a small cause decree obtained against him and was purchased by the predecessor-in-title of the appellant. The sale was confirmed on the 14th of September, 1891. The property was attached before sale and during the pendency of the attachment it was mortgaged on the 15th of June 1891 by Venkataranganadha Naicker to the predecessor-in-title of the defendant. The plaintiff-appellant has brought this suit for redemption of the mortgage on the ground that the defendant is only a mortgagee and that he being the owner of equity of redemption is entitled to redeem the property. The District Munsif decreed the appellant's suit, but the Subordinate Judge reversed it on the ground that the defendant had acquired a good title by prescription. On second appeal Madhavan Nair, J., held that the appellant's suit was barred under Art. 137 of the Limitation Act.

It is contended by Mr. Bhashyam Aiyangar for the appellant that the defendant is only a mortgagee and what was sold on the 13th of July, 1891 was only the equity of redemption and that he is, therefore, entitled to redeem the property. The defendant got an assignment of the *otti* of the suit property on the 29th of August, 1909. There is a recital in the deed of assignment that the land was being enjoyed as per *otti* and hypothecation deeds and that the assignee should enjoy the lands as per deeds above referred to. On the strength of this recital it is contended that the defendant has been in possession of the property only as a mortgagee and he cannot therefore be said to have acquired any title to the property against the appellant.

When property is sold in Court auction what is sold is the right, title and interest of the judgment-debtor as it is on the date of the sale, and any private alienation or transfer pending the attachment is void against all claims enforceable under the attachment. Under S. 64 of the Code of Civil Procedure an auction purchaser gets title to the property free of any encumbrance or any title created by the judgment-debtor; after the property was attached is to preserve the title of the judgment-debtor as it was on the date of the attachment for the benefit of the attaching creditor and, therefore, any title created after the date of the attachment to the prejudice of the attaching creditor cannot avail against the judgment-creditor

as well as the auction-purchaser. The auction-purchaser gets it free from any encumbrance or any burden that might have been created by the judgment-debtor after the date of the attachment. The mortgage of the 15th of June, 1891 could not have created a title against the auction-purchaser. The auction-purchaser obtained symbolical delivery of the property. He should have asked for possession of the property, and if he did the Court would have delivered the property to him, for the mortgagee claimed only under the judgment-debtor, and his possession, therefore, was the possession of the judgment-debtor and if he was unable to obtain possession he should have enforced his right by suit. The proper article applicable to a case like this is Art. 138 of the Limitation Act.

Granting for argument's sake that Art. 137 is applicable to the case, the appellant should have brought his suit within 12 years of the date when the judgment-debtor was entitled to possession. It is contended by Mr. Bhashyam Aiyangar that the appellant's predecessor-in-title was not entitled to possession as the property was under mortgage. Ex. I is the mortgage deed, dated the 15th of June, 1891. The period fixed in the document is five years and in 1896 therefore the mortgagor was entitled to possession. The contention of Mr. Bhashyam Aiyangar is that, so long as the usufructuary mortgagee is in possession, the mortgagor is not entitled to possession. It is very difficult to follow this argument, for when a usufructuary mortgage is created for a period of years the mortgagor would be entitled to possession on the expiry of the period ; otherwise if the argument is to hold good, it might be said that for 60 years the mortgagor would not be entitled to possession. In this case the suit should have been brought within 12 years from 15th June, 1896, but it was brought on 4th April, 1918, and it is therefore barred by limitation.

It has been seriously argued that inasmuch as the defendant claimed only a mortgagee's right, the appellant is entitled to redeem the property. This contention overlooks the fact that the defendant never claimed to be a mortgagee under the appellant. He no doubt claimed to be a mortgagee from the judgment-debtor. There is no privity of contract between the appellant and the defendant, and, even though the defendant claims only a mortgagee's right, that would not give the appellant a right to redeem the property. If the auction-purchaser does not bring a suit for possession within 12 years,

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under Art. 138, his suit for possession of the property purchased by him would be barred. The fact that the judgment-debtor has created a mortgage or a leasehold right pending the attachment would not enure for the benefit of the auction-purchaser who is entitled to get possession within 12 years of the sale under Art. 138.

In this view it is unnecessary to discuss in detail all the authorities quoted for and against the contention of the appellant. In *Dinendronath Sannial* v. *Ramkumar Ghose* (1) Sir Barnes Peacock in delivering the judgment of their Lordships of the Privy Council observes :—

"Under (a private sale) the purchaser derives title through the vendor and cannot acquire a better title than that of the vendor. Under (a sale in execution of a decree) the purchaser, notwithstanding he acquires merely the right, title and interest of the judgment-debtor, acquires that title by operation of law adversely to the judgment-debtor and freed from all alienations or incumbrances effected by him subsequently to the attachment of the property sold in execution."

In *Girija Nath Roy Chowdhury* v. *Upendra Nath Pal* (2) it was held by Mookerjee and Beachcroft, JJ. that

"If the mortgaged property was under attachment in execution of a decree when the mortgage was executed, the mortgage would be inoperative under S. 276 of the Civil Procedure Code of 1882 against the execution-purchaser, although the decree-holder was not prejudicially affected by the mortgage."

In *Subba Reddi* v. *Jayaramayya* (3) brother Odgers, J. held that a person who has purchased the property during attachment cannot apply to set aside the Court auction-sale as the conveyance to him is void against the claims enforceable under the attachment. The principle of these decisions is that any private transfer or any title created by the judgment-debtor pending the attachment cannot in any way affect the right of the attaching creditor to have the property sold and delivered free of the title created by the judgment-debtor. The provisions of S. 64, Civil Procedure Code, are clear in its terms and no one who gets a title from a judgment-debtor pending attachment can set up that title against the attaching creditor or the auction-purchaser. The case in *Gangayya* v. *Venkataramayya* (4) does not help the appellant. In that case the attaching creditor agreed for a consideration with the purchaser pending the attachment to release an item of the attached property and not to bring it to sale in execution of the decree.

1. (1881) L R 8 I A 65: I L R 7 C 107 (P C).
2. (1912) 20 I C 241.
3. (1925) 17 L W 680.
4. (1922) 44 M L J 80.

The assignee of the decree with notice of the agreement was held not entitled to proceed against the item of property agreed to be exempted from sale in execution. If in this case the defendant's predecessor-in-title had agreed to hold the property under the appellant's predecessor-in-title and executed to him an agreement, the matter would be different. No such agreement was executed and no contention is put forward that the defendant's predecessor-in-title ever agreed to hold the property as mortgagee of the appellant's predecessor-in-title.

Considerable argument was advanced to show that the word "void" in S. 64 means only "voidable". It is unnecessary to consider this contention, for, whether it is void or voidable, it is immaterial for the present purpose. The auction-purchaser's clear right was to get possession of the property; but not having got possession of the property within the time allowed by law, he is not entitled to possession, and it is immaterial what the title of the present defendant is. If the claim of the auction-purchaser is barred against the judgment-debtor, it is equally barred against any person who claims under him.

Another contention put forward by Mr. Bhashyam Aiyangar is that this is a suit to redeem and, therefore, neither Art. 137 nor 138 is applicable to the case. As I have already observed, the relationship of mortgagor and mortgagee never existed between the appellant and the defendant or their predecessor-in-title and, therefore, the plaintiff cannot redeem the property when it is not subject to a mortgage in his favour. When the auction-purchaser purchased the property he purchased it free of the mortgage and not subject to the mortgage. If he had bought it subject to the mortgage, the auction-purchaser would be entitled to redeem the property as he purchased only the equity of redemption. As already observed, what was sold in 1891 was not the equity of redemption but the property itself. Therefore the decision *Tairamiya* v. *Shibeli Saheb* (5) has no application to the present case *Gopala Dasu* v. *Rami* (6) is not applicable as the defendant or his predecessor-in-title never held out that he was a mortgagee under the appellant's predecessor-in-title.

The appeal therefore fails and is dismissed with costs.

A. S. V. *Appeal dismissed.*

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5. (1919) I L R 44 B 614. 6. (1921) I L R 44 M 946: 41 M L J 194.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE SRINIVASA AIYANGAR.

Sri Mahant Prayaga Doss Jee Varu,
Vicharanakartha of Tirumalai, Tirupathi,
etc., Devasthanams, Tirupathi ... *Plaintiff**

v.

The Board of Commissioners for Hindu
Religious Endowments, Madras ... *Defendant.*

The Secretary of State for India in Council ... *Applicant.*

Sri Mahant Prayaga Doss Jee Varu v. The Board of Commissioners for Hindu Religious Endowments, Madras.

Civil Procedure Code, O. 1, R. 10 (2)—Joinder of parties—Rules regarding—Application by third party to be impleaded—Plaintiff opposing—Question of proper or necessary party—All questions involved in the suit—To enable the Court effectually and completely to adjudicate and settle all questions—Meaning of.

In a suit filed by the head of a Hindu religious institution against the Board of Commissioners appointed under the Madras Hindu Religious Endowments Act (1 of 1925) for a declaration that the said Act is invalid and *ultra vires* and for an injunction restraining the defendant from doing certain acts, the Secretary of State for India in Council applied to be added as a party defendant. The application was opposed by the plaintiff. *Held,* as there was no cause of action alleged in the plaint against the Secretary of State and no relief claimed against him, he was neither a necessary nor a proper party to the suit and hence could not be added as party defendant.

The necessity referred to in O. 1, R. 10 (2) is for the purpose of enabling the Court effectually and completely to adjudicate upon and settle all the questions involved in a suit. The clause cannot be read as requiring that all persons who have or claim to have or are likely to have any sort of right, title or interest in respect of any portion of the subject-matter of a suit should all be made parties. The expression "all questions involved in the suit" can only be questions as between the parties to the suit and should be regarded not as absolute but only as relative. The phrase "to enable the Court effectually and completely to adjudicate upon and settle" would seem really to indicate that the addition of the party should be ordered only if in the opinion of the Court in the absence of the party it cannot effectually and completely adjudicate and settle all the questions. *Moser* v. *Marsden,* (1892) 1 Ch 487; *Norris* v. *Beazley,* (1877) 2 C P D., Vol. II, page 80 referred to.

Notice to show cause why the Secretary of State should not be added as a party to the suit.

The Advocate-General instructed by the Government Solicitor for applicant.

S. Srinivasa Aiyangar and *T. Kumaraswamiah* for plaintiff in C. S. No. 560 of 1925.

T. Rangachariar, V. Radhakrishnayya, S. Muthia Mudaliar, V. N. Venkatavaradachariar and *R. Gopalachariar* for plaintiff in C. S. No. 574 of 1925.

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*C S Nos. 560, 574 and 624 of 1925. 8th March, 1926.

Sri Mahant Prayaga Doss Jee Varu v. The Board of Commissioners for Hindu Religious Endowments, Madras.

T. R. Ramachandra Aiyar and *K. Narasimha Aiyangar* for plaintiff in C. S. No. 624 of 1925.

P. Venkatramana Rao for defendant.

The Court delivered the following

JUDGMENT :—This and the other applications in the connected suits are on the name and on behalf of the Secretary of State for India in Council for the purpose of his being added as a party to the suit presumably as party defendant.

The main object of each of the suits is to obtain a declaration that the Madras Hindu Religious Endowments Act I of 1925 is invalid and *ultra vires,* and on the basis of such declaration the plaintiff has asked for a relief by way of injunction which is merely a relief consequent on the declaration.

The plaintiff in each of the cases is the head of a mutt or religious endowment and the only defendant to each of the actions is the Board of Commissioners for the Madras Religious Endowments, a body, it may be observed in passing, created and constituted by the said Act.

The question for determination therefore is whether on the application I should direct the Secretary of State being added as party defendant in these suits. The question is of considerable importance and of great difficulty though I did not realise the full extent of either till I was more than half way through the hearing. It has been argued with much learning and light and also some little warmth on both sides, and I took time to consider my judgment not only having regard to the importance of the question to the parties but also to the general principle on which alone it seemed to me that a satisfactory solution can be arrived at. If it had been an ordinary case, I should probably have had very little difficulty in persuading the parties to agree to the addition of the party on conditions which may be regarded as equitable in the circumstances.

It was with this view that almost at the very commencement of the discussion I asked the learned Advocate-General who appeared for the applicant whether he had any instructions to agree as to any conditions as to costs. He said he had none. Some days thereafter he again appeared before me and intimated that so far as the applicant was concerned, he had definite instructions not to consent to any conditions. He, however, at the same time intimated that he had received a communication from the President of the Board of Commissioners to the effect that if in the action the plaintiff should

fail, the Board of Commissioners would consent to only one set of costs being allowed to the defendants and that they would be willing to allow the Secretary of State to take such one set. It is obvious that the two things are not and cannot be the same and that in these cases a set of costs to the Board of Commissioners must mean something very different to a set of costs to the Secretary of State, at any rate as at present represented in the action. Further I felt that such orders should, if at all, be passed only by consent of all parties. The plaintiff, however, refused to agree to any such arrangement and has asked me to decide the question raised, and having regard to the great importance of the matter and the likelihood of its being taken up elsewhere, sooner or later, I have deemed it fit to deal with the application directly and dispose of it on its merits.

The first observation that falls to be made with regard to the present application is that it is one for joinder of a third party as party defendant and made by the third party himself and not by the plaintiff or the defendant in the action. I have felt it necessary to state this because it seems to me that different considerations should apply to applications for joinder of additional parties when the party sought to be added is party plaintiff or party defendant and also when the application for such joinder is made by the party sought to be added or by either of the parties already on the record and if so, which of them. I will not pause to refer to all such considerations. In such a case as the present one however it is obvious that if a third party's application to be added as party defendant were opposed by both parties, I should have had very little hesitation in rejecting the application unless I were satisfied that the party sought to be added was not only a proper party but a necessary party. Having regard, however, in this case to the learned and strenuous argument in support of the application by Mr. Venkatramana Rao on behalf of the Board of Commissioners I have felt bound to regard it virtually as an application by both. The question thus resolves itself into this. Should the plaintiff in this case be compelled to litigate against not only the defendant of his choice against whom he has prayed for the reliefs consequent on the declaration but also against the Secretary of State ? I did not understand either the learned Advocate-General who argued the application on behalf of the applicant the Secretary of State or even Mr. Venkatramana Rao for the Board of Commissioners to argue that the appli-

cant was a necessary party to the suit in the sense in which that expression is understood in the law relating to parties to actions, that is to say in other words, as a party without whom there can be no properly constituted suit, having regard to the cause of action alleged and the relief claimed. If it is to be only a question of a permissible party, then on principle it follows that such cannot generally be ordered when it is opposed by the person to fight whom he is so brought on the record. Thus, when *A* institutes a suit on title to recover certain property from *B*, *C* should not be made additional plaintiff if *B* should object to it, except perhaps in the case of one possible exception of the title to the property between *A* and *C* being alternative in its proper sense. The principle is even stronger in the case of a plaintiff as against whom another defendant is sought to be added. It is the plaintiff that comes to Court alleging a cause of action as against a particular defendant and asking for reliefs against him. The very basic principle of judgment *inter partes* is that the judgments are not judgments *in rem* but declaratory and operative only as between them. The plaintiff being generally *dominus litus*, I fail to see on what principle of justice he can be compelled to fight against some other litigant not of his own choice unless such a process is required by a positive rule of law.

The question thus further resolves itself into this whether in such an action the Secretary of State is a proper party having regard to the rules relating to the joinder of defendants. It was on this basis that the question was really argued by all the parties. It is O. 1 of the First Schedule to the Civil Procedure Code that lays down the rules regulating the joinder of parties. Rule 3 no doubt relates to joinder of defendants but both in form and substance it is merely permissive and relates only to what the plaintiff may do if he were so minded. It is cl. (2) of R. 10 that applies to the present case. It provides that the Court may, on any stage of the proceedings either upon or without the application of either party and on such terms as may appear to the Court to be just, order that the name of any person who ought to have been joined as defendant or whose presence before the Court may be necessary in order to enable the Court effectually and completely to adjudicate upon and settle all the questions involved in the suit, be added.

It has not been suggested in this case that the applicant, the Secretary of State, is a person who ought to have been added as party defendant in the suit. The contention was

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that the presence before the Court of the Secretary of State in this case would be necessary in order to enable the Court effectually and completely to adjudicate upon and settle all the questions involved in the suit. If the expression in this clause had not been the word "necessary" but merely "desirable" a great deal might have been said for the argument adduced in support of the application. But at no stage of the discussion was I able to understand the learned gentleman that argued in support of the application to make out that the presence before the Court of the Secretary of State was necessary. The necessity referred to in the clause is for the purpose of enabling the Court effectually and completely to adjudicate upon and settle all the questions involved in a suit. It is obvious that this clause cannot be read as requiring that all persons who have or claim to have or are likely to have any sort of right, title or interest in respect of any portion of the subject-matter of a suit should all be made parties. If it be borne in mind that the suit is by a plaintiff for certain reliefs against certain persons as defendants and that the judgment of Civil Courts are not judgments *in rem* then it follows that the questions involved in the suit are only questions with regard to the right set up and the relief claimed on the one side and denied or withheld on the other. The expression therefore "all the questions involved in the suit" can only be questions as between the parties to the litigation. The phrase "to enable the Court effectually and completely to adjudicate upon and settle" would seem really to indicate that the addition of the party should be ordered only if in the opinion of the Court in the absence of the party it cannot effectually and completely adjudicate and settle all the questions. In these cases there is no question of the Court not being able effectually to adjudicate and settle any question. So far as I was able to see, the entire argument in support of the application was based on the position that in the absence of the Secretary of State the Court could not completely adjudicate upon and settle all the questions involved in the suit. In other words, the contention was that the Secretary of State was a proper party to every suit in which any question was raised with regard to the legality of any statute and that in the absence of the Secretary of State as a party in any such suit there can be no completeness of adjudication within the meaning of the rule. I confess that at first I was a little impressed with this argument. But as against this, there are found heaps of cases in the reports both in this country and elsewhere in which the

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question of whether a particular legislative enactment was *intra* or *ultra vires* was decided merely as between the parties to the litigation without any representation in the suit either of the Crown or of the public. But it may, no doubt, be remarked that in none of these cases the question has been raised or decided. The only case that has been cited before me in which there can be said to be any indication with regard to this matter is the case of *Cunningham* v. *Tomey Homma* (1).

The question in that case was whether a particular provision was *ultra vires* of a Provincial Legislature and the Attorney-General of the province was allowed to intervene at some stage. There is no decision in the case as to whether he was either a necessary or proper party and their Lordships of the Judicial Committee do not even refer to it. I am unable, therefore, to regard it as a decision at all bearing on the point.

The case of *Esquimalt and Nanaimo Ry. Co.* v. *Wilson* (2) was also cited for the applicant and relied upon. The property which was the subject-matter of that action had been the subject of a grant by the Crown and the question that arose was whether in such an action the Attorney-General of the province was a necessary party. At page 364 Lord Buckmaster, who delivered the judgment of their Lordships of the Judicial Committee, observes as follows :—

"The learned Judges of the Court of Appeal, from whose judgment their Lordships feel compelled to differ upon this point, do not refer to the rights of the Crown which may be affected but base their opinion solely on the ground that the Crown is not affected by the result and that consequently a mere declaratory order against the Crown would be of no value. But for the reservation of the rights already referred to, their Lordships would have agreed with this conclusion."

At page 368 occurs the following sentence :—

"It is true that in these circumstances certain rights which the Crown possesses, if the grant be good, will be interfered with,"

and at page 369 their Lordships concluded by saying that they

"therefore think that the Crown is affected in this matter, so that the presence of the Attorney-General is proper and necessary for the determination of justice."

It is not contended in this case that by reason of any adjudication as between the original parties to the action, the rights of the Secretary of State would in any manner or

1. (1903) A C 151. 2. (1920) A C 358.

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measure be affected. It is therefore not a case falling under the rule that the officer representing the Crown is a necessary party to every action as the result of which the rights of the Crown may be affected.

The question would, therefore, have to be determined merely on a consideration of, whether in the absence of the Secretary of State as a party to the action it is impossible to have a complete adjudication upon and settlement of all the questions involved in the suit. All the learned gentlemen that appeared at the Bar and argued the point on behalf of the various parties state that they were unable to find any decision bearing directly on the point.

I have therefore to arrive at a conclusion on first impression and on what I conceive to be the general principles applicable. The conclusion I have thus arrived at is this : If the expression "all questions involved in the suit" should be regarded as absolute and not merely relative to the parties before the Court, then the Secretary of State may in this case be regarded as a proper party and not otherwise. But it seems to me that there is neither principle nor authority that can be discovered for regarding such an expression as "all the questions involved in a suit" appearing in a rule relating to joinder of parties as absolute and not relative.

The whole scheme of the Civil Procedure seems to me to point to a suit being regarded as a suit for relief as against definite defendants, as a trial being one only as between the parties and an adjudication as one only binding them. If a plaintiff should claim certain property and it should be regarded that the question involved in the suit is generally whether he is the owner of the property and not whether as against any other particular person he is entitled to certain rights over property very serious consequences are sure to ensue and procedure in our Courts of Law is certain to become exceedingly complicated and much more disastrously prolonged than it is at present.

At this stage I may with advantage refer to two decisions that have been cited at the bar. Mr. S. Srinivasa Aiyangar for the plaintiff referred to the case of *Moser* v. *Marsden* (3). In that case the plaintiff, the patentee of a machine, brought the action against the defendant for using a machine which he alleged was an infringement of his patent. One Montforts, the maker and patentee of the defendant's machine, applied to

3. (1892) 1 Ch 487.

be added as defendant alleging that the judgment in the action would injure him and that the present defendant would not efficiently defend the action. The Court of Appeal consisting of Lord Justice Lindley and Lord Justice Kay reversing the decision of the Court below, held that Montforts not being directly interested in the issues between the plaintiff and the defendant but only indirectly and commercially affected, the Court had no jurisdiction to add him as a defendant. Lord Justice Lindley at pages 489 and 490 observes as follows:—

"But reliance is placed on the following words of the rule, which provide for adding the names of parties 'whose presence before the Court may be necessary in order to enable the Court effectually and completely to adjudicate upon and settle all questions involved in the cause or matter.' But what is the question involved in this action? The question, and the only question, is whether what Marsden is doing is an infringement of the plaintiff's patent."

And again later on that eminent Judge says:

"Can it be said that the rule prevents the plaintiff from proceeding against a defendant without having to litigate with everybody who may be in any way affected, however indirectly, by the action? It appears to me that it does not. The Counsel for the applicant grounded his argument on the allegation that Montforts' interest would be affected by the decision in this action. It is true that his interest may be affected commercially by a judgment against the defendant, but can it be said that it would be legally affected? Can we stretch the rule so far as to say that whenever a person would be incidentally affected by a judgment he may be added as a defendant?"

And Lord Justice Kay at pages 491 and 492 observes as follows:—

"No doubt the judgment in the present case may indirectly affect Montforts' patent; but the answer to that is, that whether it would affect it or not, this rule does not apply to such a case. Montforts says that the defendant will not contest the case properly, and will not conduct the defence so energetically as he would. But we cannot help that."

It seems to me that if ever a case can be conceived which would fall directly within the words of the rule already referred to this was such a case. There was a defendant, who when sued by the plaintiff for infringement of a patent right sought to justify his action on the patent right of a third party and if the terms of cl. (2) of R. 10 should be taken absolutely as contended for it would have seemed to be a clear case in which for the purpose of effectually and completely adjudicating upon and settling all questions involved with regard to the patent right of the plaintiff it was not only proper but necessary that this other patentee should have been added as a party defendant. But the Court of Appeal said "no" and decided that he was not a pro-

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per party on the ground. I take it that the words of the rule should be construed not absolutely but relatively. It is a very strong case and I confess almost repugnant to common sense. But the words of the statute that their Lordships of the Court of Appeal were considering were identical with the words which I have to consider and it has not been shown that this decision of the learned Judges has ever been overruled or even questioned. It must also be observed that their Lordships refused to make the other patentee a party to the action even though they came to the conclusion that by reason of the decision the commercial interest of the other party would be seriously affected. Mr. Radhakrishnayya referred to *Norris* v. *Beazley* (4). It was an action on a Bill of Exchange against the acceptor originally and the defendant sought to add the name of a company which he alleged was the party really liable and which had also in the same matter a counter-claim against the plaintiff. Chief Justice Coleridge makes in that case an observation which I may here reproduce. At page 83 that learned Judge observes:

"Now, this, although it is not a case of making a person a plaintiff in respect of a defendant as to whom he does not desire to be plaintiff without his against his will, is certainly the case of making a person a plaintiff consent."

Again that learned Judge at page 84 lays down that "the defendant to be added must be a defendant against whom the plaintiff has some cause of complaint, which ought to be determined in the action, and that it was never intended to apply where the person to be added as defendant is a person against whom the plaintiff has no claim, and does not desire to prosecute any."

He proceeds thus :

"It seems to me that this application is answered, and that it was not intended that persons in the position of this Company should be added as defendants, merely for the convenience of another defendant............It seems to me that it is the more important to construe this rule strictly because it is obvious that, in many cases, if the defendant's contention is right, its provisions might be made use of in a manner exceedingly harassing to plaintiffs, by forcing them to include in their actions persons against whom they do not seek to proceed, and to mix up their rights as against one person, with questions of a highly complicated nature arising between themselves and the others."

At page 85 Justice Denman says:

"I am quite clear, however, that the Court ought not to bring in any person as defendant against whom the plaintiff does not desire to proceed unless a very strong case is made out, shewing that in the particular case justice cannot be done without his being brought in."

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4. (1877) 2 C P D., Vol. II, p. 80.

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The foregoing observations seem to me to lay down in very clear and unmistakable terms the principle applicable to such a case as the present. On these principles I cannot possibly see my way to add the applicant as a party defendant to the action. I am further unable to understand why the Secretary of State is sought to be made a party to the action at all. The only suggestion on which such a joinder can be supported is that it is necessary that the declaration that the Act is *ultra vires* should be obtained in the presence of the Secretary of State. But the Secretary of State so far as the Civil Procedure Code is concerned represents merely the Government or the Sovereign and can under the present system be regarded if at all only as part of the legislative machinery. There is no principle for even suggesting that any declaration as against him will be effectual and binding as against all other possible persons such as Committees and other bodies and officers that may be constituted or created under the Act now in question.

There is no cause of action alleged against the applicant, and no relief whatever claimed against him. On a proper construction of the rule I feel constrained to hold that the applicant is not a proper party to the suit. The plaintiffs have complained of certain actions by the Board of Commissioners which would undoubtedly be unlawful but for the Endowments Act. They therefore ask for an injunction on the ground that the Act which is held up as a shield by the defence is really not available to them because it is illegal and *ultra vires*.

The declaration therefore as against the defendants must be regarded as merely ancillary to the relief claimed. On principle and authority I have therefore come to the conclusion that the Secretary of State is neither a necessary nor a proper party and that as the plaintiffs oppose his being joined as additional defendant I would not be justified in adding him as a party defendant even as a person brought in merely to look on and see fair-play to use the words of Lord Macnaghten in the case of *The Duke of Bedford* v. *Ellis* (5). Even as a sort of harmless and permissible party I am satisfied he could not be added when such addition is opposed by the plaintiff and more so when on behalf of the applicant there has been an express refusal to submit to any condition as to costs.

5. (1901) A C 1 at 12.

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Having regard to the number and variety of legislative bodies and authorities in the country at the present day, paramount, imperial, local, delegated, subordinate, etc., I feel that questions of *ultra vires* are certain to be raised in the Courts in increasingly large numbers of cases and I refuse to contemplate with equanimity the prospect of the Secretary of State for India being required by every defendant to be made a party in every one of them.

In the result the application must be dismissed with taxed costs for the plaintiffs in each of the cases and it is ordered accordingly.

T. S. V. *Application dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE DEVADOSS.

Abdul Ameeth Sahib ... *Petitioner* (Plaintiff)*

v.

Ponnambala Muthurian ... *Respondent (Defendant).*

Abdul Ameeth Sahib v. Ponnambala Muthurian.

Practice—Procedure—Jurisdiction—Court having no—Trial by it on the merits of the suit—Competency as regards—Return of plaint for presentation to proper Court—Necessity.

When a Court finds that it has no jurisdiction to entertain a suit, it is not competent for it to go into the merits of the case. It should return the plaint for presentation to the proper Court.

Petition under S. 25 of Act IX of 1887 praying the High Court to revise the decree of the Court of Small Causes, Trichinopoly, dated the 10th day of December, 1923 in Suit No. 1086 of 1923.

T. V. Ramamurthi Aiyar for petitioner.

N. Swaminatha Aiyar for respondent.

The Court delivered the following

JUDGMENT :—This is an application to revise the order of the Small Cause Judge of Trichinopoly. The Judge found that the Court had no jurisdiction. Having decided that the Court had no jurisdiction it was not competent for him to go into the merits of the case and give a decision on them. He should have returned the plaint for presentation to the proper Court. I therefore set aside the decree of the Small Cause Judge and direct him to return the plaint to the plaintiff for presentation to the proper Court. The plaintiff is responsible for filing

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*C R P No. 440 of 1924. 4th February, 1926.

the suit in a Court which had no jurisdiction. Therefore the defendant is entitled to the costs of the suit incurred in the Small Cause Judge's Court, Trichinopoly. As the Revision Petition was necessitated by the wrong order of the learned Judge I make no order as to the costs in this Court.

A. S. V. *Order set aside.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE DEVADOSS.

Thondiyil Puthalath Ukkaran Nayar ... *Petitioner** (*Deft.*)

v.

Thondiyil Ponnigari Ukkaran Nayar ... *Respondent* (*Pltff.*)

Contract Act, Ss. 69, 70—Pattadar paying revenue payable by land-owner—Remedy of—Personal decree against land-owner—Suit for—Right of—Payment in pursuance of special agreement and on behalf of land-owner—Effect—Revenue for more than three years prior to suit—Right to recover—Registered sale deed providing for payment by land-owner—Effect—Small Cause suit—Objection to frame of—Maintainability for first time in revision.

Where the suit as framed was a Small Cause suit and the relief prayed for was also one within the competency of the Small Cause Court to grant, but the defendant omitted to plead that the suit as framed was improper and that the suit should have been differently framed and that such suit would not be within the cognizance of the Small Cause Court, *held*, in a revision petition filed by the defendant against the decree passed in the suit that he could not raise the objection for the first time in revision.

The cases which have held that the remedy which is open to a pattadar who pays kist against the owner of the land who is bound to pay it is not by a personal decree but by a decree against the property have no application to a case in which there was a special agreement between the parties that the revenue payable on the plaint property was to be paid by the tarwad of the defendant, and in which from the previous conduct of the parties it is clear that the plaintiff paid the revenue on the bond on behalf of the defendant.

In a suit by the plaintiff for the recovery from the defendant personally of revenue paid by the plaintiff on his behalf, *held*, that the fact that a registered sale deed provided for the payment of kist by the defendant would not entitle the plaintiff to claim kist for more than three years prior to the date of the suit.

Petition under S. 25 of Act IX of 1887 praying the High Court to revise the decree of the Court of the District Munsif of Payoli in S. C. S. No. 171 of 1925.

T. S. Viswanatha Aiyar for petitioner.

S. Venkatachala Sastri for respondent.

The Court delivered the following

JUDGMENT :—The first point raised in this petition is that the District Munsif had no jurisdiction to try the case as

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*C. R. P. No. 331 of 1924. 5th February, 1926.

Puthalath Ukkaran Nayar v. Ponnigari Ukkaran Nayar.

the relief which could be granted to the plaintiff is not a relief which a Small Cause Court is empowered to give, viz., mortgage decree. The argument is that the defendant who is in possession of property is liable to pay the tax on the property and when the pattadar pays the tax, he can only have a remedy against the land in the same way as the Government would be entitled to proceed against it, and the defendant not being a pattadar, S. 5 of the Revenue Recovery Act (Madras) II of 1864 has no application to him. This point was not raised before the District Munsif. His contention there was that the suit was not maintainable not on the ground that the Small Cause Court could not give a mortgage decree against the defendant but on the ground that patta had not been transferred to the defendant and therefore he was not liable to pay the revenue. The point not having been raised in the first Court, I do not think the defendant should be allowed to raise it in this Court. The suit as framed was a Small Cause suit and the relief prayed for also was one within the competency of the Small Cause Court to grant, and the relief granted was only for payment of money. That being so, the frame of the suit and the relief claimed were all within the cognizance of the Small Cause Court and the defendant could have pleaded that the suit as framed was improper and that a suit should have been differently framed and such suit would not be within the cognizance of the Small Cause Court. He not having taken the point before the District Munsif is not entitled to take the point now.

The next contention is that the plaintiff cannot obtain a personal decree against the defendant, and he relies on *Subramania Chetti* v. *Mahalingaswami Sivan* (1) and *Boja Sellappa Reddi* v. *Vridhachala Reddi* (2). In *Boja Sellappa Reddi* v. *Vridhachala Reddi* (2) it was found that the payment was a voluntary payment and in *Subramania Chetti* v. *Mahalingaswami Sivan* (1) it was found that the mortgagee paid the kist on the property not in his capacity of pattadar but in his capacity of a mortgagee. In a recent case, C. R. P. No. 489 of 1923, Mr. Justice Krishnan held that the remedy which is open to a pattadar who pays kist against the owner of the land who is bound to pay it is not by a personal decree but by a decree against the property. These cases have no application to the present case as the District Munsif finds that there was a special agreement between the parties that the revenue

1. (1909) I L R 33 M 41: 19 M L J 627 (F B).
2. (1906) I L R 30 M 35: 16 M L J 569.

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payable on the plaint property was to be paid by the Tarwad of the defendant, and from the previous conduct of the parties it is clear that the plaintiff paid the revenue on the land on behalf of the defendant. That being the course of conduct between the parties, it is not now open to the defendant to contend that the plaintiff is not entitled to obtain a personal decree against him. The District Munsif has given a decree for the revenue for 4 years on the ground that Ex. I which is a registered sale deed provides for the payment of kist by the defendant. Under that document, the vendee, *i. e.*, the defendant, was asked to pay assessment. That would not enable the plaintiff land-holder to claim kist for more than three years prior to the date of the suit. The decree will therefore be modified by giving the plaintiff a decree only as regards the three years' kist. Each party to bear his own costs.

A. S. V. *Decree modified.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE WALLACE.

Panchapakesa Aiyar ... *Appellant* (Appellant—Respondent-plaintiff)*

v.

Natesa Pathar ... *Respondent (Respondent—Petitioner-2nd defendant).*

Panchapakesa Aiyar v. Natesa Pathar.

Civil Procedure Code, S. 144—Court of first instance—Meaning—Court of first instance ceasing to have jurisdiction—Court of first instance in case of—S. 37 (b)—Principle of—Applicability—Restitution—Application for—If one in execution—Execution petition—Continuation of—Petition presented to right Court—If can be continuation of one presented to wrong Court—Limitation Act, S. 14—Application of.

In interpreting the phrase "the Court of first instance" in S. 144, Civil Procedure Code, the Court must proceed upon some general principle which would apply even to cases where the Court of first instance has been abolished and must apply such a general principle also to cases where the Court of first instance has ceased to have jurisdiction. The principle laid down in S. 37 (*b*) must be followed.

Held, therefore, in a case in which at the date of an application for restitution "the Court of first instance" had ceased to have jurisdiction over the locality of the cause of action in question, the application could be presented to the Court which had such jurisdiction.

Under the present Code an application for restitution is an application in execution.

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*A A A O No. 81 of 1924. 16th February, 1926.

Panchapakesa Aiyar v. Natesa Pathar.

An application for restitution presented to the right Court cannot be held to be the continuation of a petition previously presented to a wrong Court.

S. 14 of the Limitation Act applied to an application for restitution.

Appeal against the decree of the District Court of East Tanjore at Negapatam in A. S. No. 212 of 1923 preferred against the order of the Court of the District Munsif at Nannilam, dated 6th March, 1923 in E. A. No. 16 of 1923 in O. S. No. 276 of 1915 on the file of the Court of the Principal District Munsif of Tiruvalur.

M. S. Venkatrama Aiyar for appellant.

S. Muthiah Mudaliar for respondent.

The Court delivered the following

JUDGMENT :—This appeal relates to an application for restitution under S.144, Civil Procedure Code, in the following circumstances. Neither of the Lower Courts has stated the facts correctly. The Court of first instance, the Principal District Munsif's Court of Tiruvalur, had decreed the plaintiff's (appellant's) suit. On first appeal the second defendant (respondent here) was directed to pay into the first Court Rs. 750 as security for mesne profits. The money was paid into Court on 2nd October, 1917 and the plaintiff drew it out on 11th November, 1918. On second appeal in the High Court the plaintiff's suit was dismissed on 1st September, 1919. On 16th August, 1922 the respondent put in an application for restitution in the Court of the Principal District Munsif of Tiruvalur, the Court which had passed the decree. Now in June, 1922 the Court of the Additional District Munsif of Tiruvalur which had hitherto no independent territorial jurisdiction was given such jurisdiction over a locality including the locality of the present cause of action. The Principal District Munsif holding that he had no jurisdiction to entertain the application transmitted it to the Additional District Munsif's Court. That Court held that the Principal District Munsif had no jurisdiction to order such a transfer and directed a fresh application to be put in before him. This was done on 27th September, 1922. On 1st January, 1923 this Additional District Munsif's Court became the Court of the District Munsif of Nannilam.

The appellant contended in the 1st Court that the District Munsif's Court of Nannilam had no jurisdiction. That was overruled and the application for restitution was allowed. He appealed to the District Court of East Tanjore, apparently

giving up the contention that the District Munsif's Court of Nannilam had no jurisdiction, but contending that the application was barred by limitation. The District Judge held against him and dismissed his appeal and he now appeals here.

The two points urged here are, that the District Munsif's Court of Nannilam had no jurisdiction, the contention however being on a new argument, and that the application is out of time. The appellant's contention is that S. 144 directs that such application must be put in *in the Court of first instance*, and points to the difference in language between this section and the old S. 583 where the phrase used was "the Court which passed the decree." He contends that, since the Court of first instance was the Principal District Munsif's Court which is still in existence, that was the proper Court to which the application should be put in. The Code has not defined for the purpose of S. 144 what is "the Court of first instance" when the "Court of first instance" has lost territorial jurisdiction. Under the old Code there was no such difficulty, since the phrase used "the Court which passed the decree" was defined by S. 649 (present S. 37). The reason for the change of language is not obvious, and it will certainly result in technical difficulties, for example, in a case where the Court which actually passed the decree has been abolished. S. 150, Civil Procedure Code, would not apply in terms to such a case. I think in a case like the present the Court must proceed upon some general principle in interpreting the phrase "the Court of first instance" which would apply even to cases where the Court of first instance has been abolished and must apply such a general principle also to cases where the Court of first instance has ceased to have jurisdiction. I think it clear that the principle laid down in S. 37 (*b*) must be followed. On some such principle the ruling in *Lakshmana Goundan* v. *Subramania Aiyar* (1) proceeds.

The appellant further argues that S. 37 (*b*) cannot be called in aid because that section only applies to cases of applications for execution, and that an application for restitution is not an application in execution. He admits that the balance of authority in this Court is against him [see *Venkayya* v. *Raghavacharlu* (2) under the old Code, *Unnamalai Ammal* v. *Mathan* (3), *Sudali Muthu Pillai* v. *Sudali Muthu Pillai* (4)

1. (1920) 13 L W 67.
2. (1897) I L R 20 M 448: 8 M L J 79.
3. (1917) 33 M L J 413.
4. (1922) 17 L W 623.

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and *Somasundaram* v.*Chockalingam* (5) under the new Code], and there is the authority of the Privy Council in *Parag Narain* v. *Kamakhia Singh* (6) that proceedings under the old Code, S. 583, were proceedings in execution. He contends strenuously that such matters as the payment of interest, damages, compensation, etc., which may be awarded under S. 144 cannot be matters in execution, since the decree in no way provides for them. Were the matter *res integra* such a contention might be reasonable. But the trend of authority is too strong against it. Even under the old S. 583 all that the Court executing a decree could strictly do was to execute it and obviously the restoration by way of restitution of any sum paid under the decree before it was reversed by the appeal decree would not come strictly within the term " execution ". Nevertheless it has been laid down by the Privy Council that restitution under S. 583 was a matter in execution. If then this term " execution " can be stretched to include restoration by way of restitution of the principal sum paid under a decree before it was reversed I see no difficulty in stretching the term a little further to include collateral reliefs of interest, damages and compensation. No doubt other High Courts have held that proceedings under the new S. 144 are not proceedings in execution [see *Jiwa Ram* v. *Nand Ram* (7) and *Balmakund Marwari* v. *Basanta Kumari* (8)]. The view in Bombay is the same as in Madras [vide *Kurgodi Gowda* v. *Lingam Gowda* (9) and *Hamidalli* v. *Ahmedali* (10)]. In such matters it is more important that a uniform procedure be adhered to than that the strict wording of the section be enforced. I am not therefore prepared to uphold the contention that the present application for restitution is not an application in execution. I see therefore no objection in applying the principle of S. 37 (*b*) in interpreting the phrase " the Court of first instance " when that Court has ceased to have territorial jurisdiction over the locality of the cause of action.

The " Court of first instance " in the present case therefore was the Additional District Munsif's Court of Tiruvalur, now the Principal District Munsif's Court of Nannilam.

The next point is that the application to the Principal District Munsif of Tiruvalur was improper and therefore

5. (1916) I L R 40 M 780.
6. (1909) I L R 31 A 551: 19 M L J 599 (P C).
7. (1922) I L R 44 A 407.
8. (1924) I L R 3 Pat 571 (F B).
9. (1917) I L R 41 B 625.
10. (1920) I L R 45 B 1137.

Panchapakesa Aiyar v. Natesa Pathar.

cannot be called in aid to save limitation. The Lower Appellate Court got over that difficulty by holding that the present petition to the Additional District Munsif's Court of Tiruvalur was merely a continuation of the petition to the Principal District Munsif's Court of Tiruvalur. But I do not think that contention will hold. If the original petition is not a proper one the continuation of it cannot be proper. The respondent calls in aid S. 14 of the Limitation Act. It appears from the endorsements on the E. A. No. 628 of 1922 that it was being prosecuted in the Court of the Principal District Munsif from 16th August, 1922 to 25th September, 1922. This period will have to be excluded. The proper petition to the "Court of first instance" was put in on 27th September, 1922. The petition is, therefore, within the excluded period, within three years of 1st September, 1919 and is in time.

I see no reason to interfere with the order of the Lower Appellate Court and dismiss this appeal with costs.

A. S. V. *Appeal dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE DEVADOSS AND MR. JUSTICE WALLER.

Kizhakkumbat Madhathil Appu *alias* Subramania Pattar ... *Appellant** (*Petitioner*)

v.

C. Achutha Menon, Receiver (dead) and others ... *Respondents* (*Counter-petitioners* 1 *to* 4).

Appu v. Achutha Menon.

Civil Procedure Code, O. 21, R. 66—Proclamation of sale—Settlement of—Duty of Court—Delegation to Commissioner appointed by it—Legality—Sale held without proclamation settled by Court—Validity—Judgment-debtor aware of contents of proclamation settled by Commissioner—Effect.

Under O. 21, R. 66, Civil Procedure Code, the Court ought to settle the proclamation of sale, and it cannot delegate that power to a Commissioner appointed by it.

Even if the judgment-debtor was aware of the contents of the proclamation prepared by the Commissioner that would not relieve the Court of its duty of settling the proclamation.

If the proclamation was not settled by the Court the sale would be invalid.

Appeal against the order of the District Court of South Malabar, dated the 4th day of April, 1921, 28th day of

*A A O Nos. 335 and 366 of 1922 and 21 of 1924. 20th November, 1925.

Appu v. Achutha Menon.

November, 1921 and 29th day of August, 1923 in M. P. No. 51 of 1921, in M. P. No. 92 of 1921 and in M. P. No. 221 of 1923 in O. S. No. 4 of 1917.

K. Kuttikrishna Menon for appellant.

A. V. K. Krishna Menon for respondents.

The Court delivered the following

JUDGMENT :—The first point raised in this appeal is that the proclamation of sale was not settled by the Court but that the Commissioner appointed by the Court after the preliminary decree prepared the proclamation of sale and sold the property. It is for the Court to settle the proclamation of sale and it could not delegate that power to the Commissioner appointed by it. O. 21, R. 66 directs that when any property is ordered to be sold by public auction in execution of a decree, the Court shall cause a proclamation of the intended sale to be made in the language of such Court and then such proclamation shall be drawn up after notice to the decree-holder and the judgment-debtor and shall state the time and place of sale and specify as fairly and accurately as possible the property to be sold and a number of things. It is also contended that no reserve price was mentioned in the proclamation of sale. It is also urged that the appellant was not allowed to bid at the auction. The learned Judge relying upon the report of the Receiver has dismissed the appellant's application to set aside the sale. Even if the appellant was aware of the contents of the proclamation prepared by the Receiver that would not relieve the Court of its duty of settling the proclamation. As the records stand at present we are unable to say whether the allegation of the appellant is true or false. If the proclamation was not settled by the Court the sale would be invalid. As the learned District Judge has not taken evidence in support of the allegations in the petition and as the auction purchasers are not represented here, we think the proper course would be to set aside the order of the District Judge and direct him to restore the application of the appellant to file and dispose of it after taking such evidence as may be adduced by him and other parties to the suit. Costs of this appeal will abide the result and be provided for in the order that will be passed by the District Court.

The same order on C. M. A. Nos. 366 of 1922 and C. M. A. No. 21 of 1924.

A. S. V. *Order set aside: Case remanded.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE ODGERS.

Ramaswami Nayakar ... *Appellant** (*Plaintiff*)

v.

Raju Padayachi and others ... *Respondents* (*Defendants* 2, 3, 4, 5, 6 *and* 8).

Ramaswami Nayakar *v.* Raju Padayachi.

Account book—Signature in one part—Genuineness of—Finding as to—Propriety—Signature in another part forged—Effect—Hindu Law—Joint family—Member of—Self-acquisition of—Throwing into common stock—Registered instrument—Necessity—Question as to throwing—Fact or law.

The fact that in one place of an account book the signature of a party may be forged cannot preclude the Court from holding that his signature in another place is genuine.

The question whether the self-acquired property of a member of a joint Hindu family has been thrown by him into the common stock or not is a question of fact.

A member of a joint Hindu family who owns immoveable property as his self-acquisition can convert it into joint family property without a registered instrument even in places where the Transfer of Property Act is in force.

Second Appeal against the decree of the Court of the Subordinate Judge of Cuddalore in A. S. No. 209 of 1921 (Appeal Suit No. 205 of 1921 on the file of the District Court of South Arcot) preferred against the decree of the Court of the District Munsif of Panruti at Cuddalore in A. S. No.200 of 1919.

T. R. Ramachandra Aiyar, T.R.Krishnaswami Aiyar and *S. Ramaswami Aiyar* for appellant.

K. S. Jayarama Aiyar for respondents.

The Court delivered the following

JUDGMENT :—This is an appeal involving title to a certain house which the plaintiff bought in Court auction. The question is whether the 8th defendant, in pursuance of a decree against whom the sale was held, was competent to mortgage the entire house as he did or as he purported to do in 1911, or whether defendants 2 to 6, who are his nephew together with his children, have also rights in the said house. It is common ground that the 8th defendant acquired the house under the will of one Poongavanam as his own separate property. The whole question in the second appeal is whether or not, after thus acquiring the suit house, the 8th defendant threw it into the common stock of the joint family consisting of himself and

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*S A No. 275 of 1923. 11th September, 1925.

Ramaswami Nayakar v. Raju Padayachi.

defendants 2 to 6 subsequent to his acquisition of it and before the family became divided in interest which event took place in 1904. Now, the District Munsif found that the 8th defendant had not thrown it into the common stock, that is to say, that he had not given up his own exclusive rights and treated the property as joint family property. On the other hand, the Subordinate Judge held, differing from the District Munsif, that the evidence did establish that the house was thrown into the common stock.

The first point that is pressed on me is as to Ex. VI. Now Ex. VI is a book containing a list which is headed "List of particulars of house and manai, etc., " and for the purposes of this case page 13 and part of page 14 have been printed in the documents. The house in question is said to be item No. 3 and these pages are signed at page 14 at the end of the 8th item by the 8th defendant, A. Appavu Padayachi. The District Munsif decided that Ex. VI was not genuine and Mr. T. R. Ramachandra Aiyar, without going so far as to say that the question of the genuineness of Ex. VI was concluded by the judgment of this Court in O. S. No. 303 of 1910, says that the Subordinate Judge has not given sufficient weight to Ex. VI as established in that prior suit. In fact he must go the length of saying that owing to the Subordinate Judge's treatment of Ex. VI and the evidence generally, the finding that the Subordinate Judge has come to is, in fact, a perverse finding. For, if he did not, with the exception of a point of law to be mentioned in a moment, the case simply resolves itself into a question of fact and appreciation of evidence, one Court taking one view of the evidence and the Lower Appellate Court another. The prior litigation referred to was between a plaintiff—a stranger to this suit—and defendants 2, 8 and others. It concerned not the suit house but a certain tope, and the High Court sent down to the District Judge for a finding on the question as to whether the suit land belonged to the 1st defendant (who is the 2nd defendant here), or whether it was the joint family property of all the defendants. Ex.VI here was Ex.II in that case, and the tope in question was entered on pages 15 and 16 with other family property, the 1st defendant purporting to have signed the document on page 16. As found by the District Judge, the 1st defendant denied his signature on page 16, and there was a difference between his alleged signature on page 16 and his admitted signature at the end of page 11. The finding was that there was no proof that

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the 1st defendant signed Ex. II at page 16 and that no inference can be drawn that the 1st defendant threw the lands into the common stock. The finding was accepted by the High Court.

Now, it seems to me that this decision can have no bearing whatever on the present case. The property in suit is different; the pages in the book in question are different; and it is to be noted that on page 11, according to the District Judge, the 1st defendant who is the 8th defendant here admitted his signature. It seems to me that the fact that in another place in the same book there may have been a forged signature of the 8th defendant cannot preclude the Subordinate Judge in this case from finding that the signature is genuine at pages 13 and 14 of Ex. VI.

It was then argued that transactions and conduct subsequent to 1904, the date of the partition, are inadmissible in evidence. This argument was directed I take it to Ex. I, VIII and XII series and VII and IX which are relied on by the Subordinate Judge. It is said that these documents must all be held to be forgeries because from 1904 to 1906 there was ill feeling between these two defendants. The learned Subordinate Judge was quite sensible of that state of things and he regards the evidence as corroborating the other evidence that this house was thrown into the common stock in or before 1904. I think he is perfectly entitled to do so under S. 8 of the Evidence Act and if he finds on the evidence that there is no sufficient reason for regarding these documents as forgeries, I have nothing more to say to his finding in second appeal. So then treating the case purely on a question of fact and appreciation of evidence, it is clear that the second appeal is liable to be dismissed.

Now the further question arises whether the law which has been quoted to me makes any difference in this view. I will first deal with the cases cited on behalf of the appellant. The first is that in *Lala Muddum Gopal Lal* v. *Khikhinda Koer* (1). In that case there were two brothers and one of them was disqualified under the Hindu Law on account of a physical infirmity. The brother of the disqualified co-parcener nevertheless treated his brother as a member of the family entitled to equal rights until it became clear that the latter's malady was incurable. Their Lordships said that "acts done out of kindness and affection to the disadvantage of the doer of

7. (1890) L R 18 I A 9 : I L R 18 C 341 (P C).

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them, should not be construed as a gift when it is plain that no gift could have been intended." That really does not touch the present case in the slightest and it is a case from all the circumstances of which their Lordships inferred that the disqualified brother was not intended to be given a share by the other. The next case *Krishnaji Mahadev Mahajan* v. *Moro Mahadev Mahajan* (2) also turns on a question of fact as to whether two brothers there had voluntarily thrown their property into the joint stock with the intention of abandoning all separate claims upon it. If they did so, the property would thereupon under the Hindu Law become joint property.

A more interesting question has been raised this morning for the first time (there is no evidence of its having been raised in either of the Lower Courts), viz., that when a co-parcener throws self-acquired property into the common stock of the co-parcenary consisting of himself and others, a registered deed is necessary to effect the transaction. Three cases are relied on in this Court of which one was decided by myself sitting as a single Judge in *Made Gouda* v. *Chenne Gouda* (3). Now it is to be noticed that in both these cases, where a deed was held to be necessary, the transaction was, in the eye of the law, between strangers. In *Made Gouda* v. *Chenne Gouda* (3) I expressly said that I found it difficult to understand how the second defendant could be made a co-sharer as he was admittedly not a member of the joint family and therefore not a co-parcener; and in *Venkata Reddi* v. *Kuppa Reddi* (4) Seshagiri Aiyar, J. who delivered the judgment of the Court came to the conclusion that the first and the fourth branches of the family there became divided *inter se* and that they held the A Schedule properties as tenants-in-common, *i. e.*, that they had become divided. The question there was whether joint living, failure to keep accounts, the fact that marriage expenses were incurred indiscriminately without reference to the shares belonging to the two branches and that acquisitions were made jointly would constitute what was originally separate property into co-parcenary property; so that if the first branch elected to throw its extra share into the hotchpot, the transaction could only be regarded as a gift of half of the extra share to the fourth branch and would require a registered document. The third case that was

2. (1890) I L R 15 Bom 32 at 39. 3. (1925) 49 M L J 150.
4. (1918) 8 L W 400.

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principally relied on in this connection is *Thylambal* v. *Krishna Pattar* (5) decided by Coutts Trotter and Srinivasa Aiyangar, JJ. The former said that it is possible for a member of a Hindu family who has got self-acquired properties to convert them, if he chooses, into family property in which the other members of the family will have a vested interest and that the only question in that case was whether the facts pointed to the conclusion that the first defendant did convert his own property into family property or not. Not a word is said by the former learned Judge about the necessity of a registered deed. Srinivasa Aiyangar, J., while concurring in the judgment of Coutts Trotter, J., entertained some doubt as to whether a member of a joint Hindu family who owns immoveable property as his self-acquisition can convert it into a joint family property without an instrument in writing registered at least where the Transfer of Property Act is in force. The learned Judge found difficulty in understanding the conversion of individual property into joint property except by way of a transfer and thought that such a conversion would on analysis be found to partake of the character of one or other of gift, exchange or sale. It is certainly difficult, speaking for myself and with all deference to the learned Judge, to see how the conversion would ordinarily be by exchange or sale. If the transaction were one by way of gift, it being impossible for a man to make a gift to himself, I gather we should have to conceive the donor as in the position of a stranger to the co-parcenary of which he is in fact himself a member. However, this is a question that need not be gone into by me at the present moment. The question is an interesting one raised by the learned Judge as a matter of doubt in his own mind and it still awaits as far as I am aware an authoritative decision.

Beyond this there is no authority that has been produced before me for saying that, where a co-parcenary owner of self-acquired property wishes to throw the latter into the common stock of the co-parcenary, he can only do so by a registered instrument. Nothing is said about this in the later cases on the point of throwing into the common stock, as for instance, *Suraj Narain* v. *Ratan Lal* (6), a case in the Privy Council, where their Lordships say, "In a Hindu joint family the law is that, while it is possible that a member of the joint family should make separate acquisition, and keep moneys and property so acquired as his separate property, yet the question

5. (1919) 52 I C 955 at 960. 6. (1917) I L R 40 A 159 : 33 M L J 180 (P C).

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whether he has done so is to be judged from all the facts of the case" ; and in *Kedar Nath* v. *Ratan Singh* (7) the question was considered as to whether a certain estate was the self-acquired property of one of the brothers or was the joint property of the three. It was said in comment on this and other cases of the kind that the transactions took place before the Transfer of Property Act, but whether that makes any difference in law, is, as I have said, a matter not yet decided. In *Sudarsanam Maistri* v. *Narasimhulu Maistri* (8) Bhashyam Aiyangar, J. says, " Property acquired without the aid of joint family property, by one or more individuals thereof whether they belong to different branches or to one and the same branch of the family may by act of parties be incorporated with the joint property of the main family or one of its branches"; and no question is raised there as to whether when that took place a registered instrument is required. The result is that the point of law raised to-day on behalf of the appellant does not take his case any further.

I was then asked to convert this suit into a suit for general partition in order that the house in question might be allotted to the 8th defendant and that therefore his alienee, the Court auction-purchaser, might be decreed possession thereof. It is difficult to see how this can be done as the suit only concerned this one item of property.

The second appeal must be dismissed with costs of respondents 1 to 5.

T. S. V. *Appeal dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE SPENCER AND MR. JUSTICE MADHAVAN NAIR.

S. R. Subramania Aiyar ... *Appellant* in A. A. O. No.* 86 *of* 1925 and *Petitioner in C. R. P. No.* 147 *of* 1925 (*Petitioner—1st defendant*)

v.

L. A. Krishna Aiyar ... *Respondent on both (Respondent—Plaintiff).*

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Civil Procedure Code, S. 47—Execution sale—Application by judgment-debtor to stop—Order rejecting—Appeal against—Right of—Sale held before

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*A A O No. 86 of 1925 and
C R P No. 147 of 1925. 8th September, 1925.

7. (1910) I L R 32 A 415 : 20 M L J 900 (P C).

8. (1901) I L R 25 M 149 : 11 M L J 553.

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filing of appeal and confirmation question pending in Court below—Remedy of judgment-debtor in case of—Execution of decree—Application in accordance with law for—Attachment list prepared by Amin—Omission to file—Effect—Attachment before judgment—Rejection of execution petition for decree-holder's default—Effect on attachment—Attachment before sale—Omission to effect—Irregularity or illegality—Effect on sale.

The appeal was against an order rejecting an application by the appellant (judgment-debtor), praying for (1) the stopping of the execution sale of his immoveable property, (2) the vacating of the proceedings in the execution petition in pursuance of which the sale was sought to be held, and (3) the dismissal of the said execution petition.

It appeared that the sale sought to be stopped had taken place prior to the filing of the appeal and that it awaited the Lower Court's order of confirmation under O. 21, R. 92, Civil Procedure Code.

Held by Spencer, J. that no appeal lay against the order of the Court below, and that the appellant's remedy lay in applying under O. 21, R. 90, Civil Procedure Code, to have the sale which had taken place set aside.

The High Court should not make a declaration or pronouncement of opinion as to the validity of a sale while an order confirming or setting it aside is pending in the Court below.

Per Madhavan Nair, J.—A copy of the attachment list prepared by the Amin is not absolutely necessary for proceeding with the execution of the decree; and an application for execution does not cease to be one in accordance with law merely because the copy of that list is not filed by the decree-holder.

An attachment before judgment ceases on the dismissal on account of the decree-holder's default of an execution application filed after the passing of the decree.

A sale of properties in execution without an attachment is not void *ab initio*. The absence of attachment prior to sale is only an irregularity, and the sale will be set aside on the ground of that irregularity only if the Court is satisfied that the judgment-debtor has sustained substantial injury by reason of that irregularity.

Appeal against and petition under S. 115 of Act V of 1908 and S. 107 of the Government of India Act to revise the order, dated 29th November, 1924 of the Court of the Subordinate Judge of Coimbatore in E. A. No. 722 of 1924 in E. P. R. No. 35 of 1924 in O. S. No. 117 of 1918.

The Advocate-General and *M. Krishna Bharati* for appellant.

T. R. Ramachandra Aiyar and *P. R. Ramakrishna Aiyar* for respondent.

The Court delivered the following

JUDGMENTS :—*Spencer, J.* :—The respondent, having attached the appellant's immoveable properties before judgment, obtained a decree for Rs. 2,224-12-0 against him and his mother on 28th January, 1919. Afterwards he applied

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through E. P. No. 35 of 1924 for sale of the properties which were attached before judgment. In the interval two petitions for executing the same decree had been rejected owing to the execution-petitioner's fault. The appellant filed C. M. P. No. 722 of 1924 on 18th November, 1924, asking (1) that the auction sale fixed for 24th November, 1924 should be stopped, (2) that the whole proceedings in the pending E. P. R. No. 35 should be vacated, and (3) that E. P R. No. 35 should be dismissed. The Subordinate Judge of Coimbatore refused these reliefs and dismissed the Civil Miscellaneous Petition. From that order the appellant has filed an appeal and a revision petition to the High Court on 2nd March, 1925. The sale took place on 9th February, 1925, and awaits the Lower Court's order of confirmation under O. 21, R. 92, Civil Procedure Code. The appellant's vakil contends that the attachment of the property ceased by virtue of O. 21, R. 57 upon the dismissal for default of the prior execution petitions, the attachment before judgment being good only until the first execution petition after the passing of the decree was dismissed [vide *Meyyappa Chettiar* v. *Chidambaram Chettiar* (1)] and that the sale of property without a previous subsisting attachment was illegal.

In my opinion there is a short answer to this appeal and the accompanying revision petition. The sale having already taken place, the judgment-debtor's remedy lies in applying under R. 90 of O. 21 to have it set aside, and from the order to be passed by the executing Court he will have the right of appeal to this Court under O. 43, R. 1 (*j*), Civil Procedure Code.

It is too late to stop the sale after it has taken place, and at the same time it would be premature on the part of this Court to set aside the sale, the power to do so being vested in the first instance in the executing Court. The appellant did not obtain an order from the High Court to stay the sale before it was concluded. We should not make a declaration or pronouncement of opinion as to the validity of a sale while an order confirming or setting it aside is pending in the Court below, and there is no room for our interfering otherwise with the course of the execution petition which will be finally disposed of only when final orders are passed under R. 92 and when it is known to what extent the decree has been satisfied. The fact that there is no right of appeal provided in the Code

1. (1923) I L R 47 M 483 : 46 M L J 415 (F B).

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of Civil Procedure against orders under O. 21, Rr. 64 and 66 for sale of property indicates that such orders are of an interlocutory nature. The appealability of an order for sale was raised in *Namuna Bibi* v. *Rosha Miah* (2) but not argued with assurance (*vide* page 486). The learned Judges considered that an appeal lay under S. 47, Civil Procedure Code, as it was a question between the parties in execution. This Court has applied S. 47 to applications to set aside a sale that has been illegally held, apart from irregularities in publishing or conducting it[vide *Anantharama Aiyar* v. *Kuttimalu Kovilamma* (3) and *Muthiah Chettiar* v. *Bava Sahib* (4).]. But the petition of 18th November, out of which this appeal and revision petition have arisen, was not a petition to set aside a sale, as no sale had been held when it was presented. The order of the Subordinate Judge dismissing it was passed before any sale was held, and thus it cannot be treated as an order upon an application under S. 47 to set aside an illegal sale. The grounds upon which the judgment-debtor tried to stop the sale were that the previous execution petitions were dismissed and that their dismissal put an end to the attachment. He did not then raise the contention, which he has raised here, viz., that the attachment before judgment only enures for the first execution application after decree. If the judgment-debtor had put forward this objection before the sale took place, the decree-holder might have overcome the difficulty by applying for a fresh attachment of the lands. After the sale had been held, it does not appear that he made an attempt to have the sale set aside by the Sub-Judge under S. 47 as illegal for want of a fresh attachment upon this ground, which has not been considered in the Judge's order of November 29, 1924, and the present appeal cannot be treated as an appeal against an order which the Sub-Judge might have made if such a contention had been put forward at the proper time. For these reasons, I consider that the only order we can make is to dismiss this appeal with costs. The revision petition being only an alternative remedy to the appeal is dismissed without costs.

Madhavan Nair, J.

Madhavan Nair, J. :—This appeal arises from an application made by the appellant judgment-debtor objecting to the sale of certain properties in execution of the decree in O. S. No. 117 of 1918, Sub-Court, Coimbatore, on the ground that the properties in question had not been attached prior to the

2. (1911) I L R 38 C 482. 3. (1916) 30 M L J 611. 4. (1914) 27 M L J 605.

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order for sale. The decree-holder, the respondent before us, had obtained a decree for money against the appellant and had attached the said properties before judgment. After the decree, he filed two successive applications for execution which were returned by the Court for making some corrections and for the production of some papers. As the directions of the Court were not complied with these petitions were eventually dismissed. The decree-holder afterwards filed E. P. No. 35 of 1922 for the execution of his decree by sale of the properties and the sale was fixed for the 24th November, 1924. When the appellant became aware of the said execution petition he applied to the Sub-Court in E. A. No. 722 of 1924 praying "to stop the sale fixed for 24th November, 1924 and to vacate the whole proceedings in E. P. R. No. 35 of 1924 and to dismiss the petition and to pass such other and further orders as may be just and necessary." The Subordinate Judge held that since the two petitions which were dismissed for non-compliance with the Court's order could not be considered as execution petitions in accordance with law, their rejection could not operate to vacate the existing attachment under O. 21, R. 57, Civil Procedure Code, and that therefore no re-attachment was necessary to bring the properties to sale. In this view he held that there was no need to stop the sale or to dismiss the execution petition (E. P. R. No. 35 of 1924) and that the respondent has rightly brought the attached properties to sale. The properties have since been sold and purchased by the decree-holder.

It is argued by the appellant that the petitions which were dismissed were execution petitions in accordance with law, that since they were dismissed for the default of the decree-holder, the attachment of the properties has ceased under O. 21, R. 57, Civil Procedure Code, and that as no further attachment was made the order of the Subordinate Judge to proceed with the sale of the properties should be set aside. Besides supporting the order of the learned Judge on the reasons contained in it the respondent in this Court has put forward an additional ground in further support of the order, namely, that even if the attachment has ceased under O. 21, R. 57, Civil Procedure Code, the failure to re-attach the properties prior to the sale is only an irregularity and not an illegality vitiating the sale; and that unless the Court is satisfied that the petitioner sustained substantial injury by reason of such irregularity the Court should not set aside the order. He has also argued that no

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appeal lies against the order passed by the Subordinate Judge under S. 47 of the Code of Civil Procedure.

The questions for our consideration arising upon the above contentions of the respective parties are: (1) Are the petitions dismissed for default by the Subordinate Judge for non-compliance with his directions execution petitions in accordance with law? (2) Does O. 21, R. 57, Civil Procedure Code, apply to the facts of this case? (3) If questions 1 and 2 are decided in favour of the appellant, is the sale of properties without an attachment void *ab initio* or is absence of attachment prior to sale only an irregularity? (4) Does an appeal lie against the order?

As regards question 1, I have no doubt the opinion of the Subordinate Judge is clearly wrong. The respondent's learned vakil himself has only very faintly attempted to support it. I have carefully examined the second petition dismissed for default by the Subordinate Judge. I am satisfied that it has complied with all the requirements demanded by the Code and that it is an application in accordance with law under O. 21, R. 17, Civil Procedure Code. The paper that was called for but not produced for want of time, viz., the copy of the attachment list prepared by the Amin, was not as was seen subsequently, absolutely necessary for proceeding with the execution of the decree in this case and it was found, when requisition for the same paper was made in E. P. No. 35 of 1924 also, and on which sale of the properties was afterwards ordered, that the document called for had been destroyed. In fact, the order for sale of the properties now objected to was passed in E. P. No. 35 in the absence of this document. In these circumstances I am satisfied that the applications for execution were really in accordance with law and the Court could have passed orders on them to effectively carry out execution.

In the view that the applications dismissed for default are applications in accordance with law, the next question for us to consider is whether O. 21, R. 57, Civil Procedure Code, applies to the facts of this case. According to that rule, when any property has been attached in execution of a decree and the application filed for execution has been dismissed by reason of the decree-holder's default, such dismissal will have the effect of vacating the attachment. In this case, as already mentioned, the properties had been attached before judgment. O. 38, R. 11, Civil Procedure Code, states that when a decree

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is subsequently passed it shall not be necessary upon an application for execution of such decree to apply for re-attachment of the property. It has been held in *Meyyappa Chettiar* v. *Chidambaram Chettiar* (1) that O. 21, R. 57, Civil Procedure Code, applies to cases where property had been attached before judgment and that if an execution application filed after the passing of the decree has been dismissed on account of the decree-holder's default, then the attachment ceases. Applications for executions in this case having been dismissed by reason of the decree-holder's default, it follows from the authority of this ruling that the attachment existing on the properties ceased and these, when ordered to be sold, were not under attachment. This conclusion renders it necessary to decide the third question raised by the parties, namely, whether a sale of properties in execution without an attachment is void *ab initio*.

In *Sharoda Moyee Burmonee* v. *Wooma Moyee Burmonee* (5) it was held by Jackson, J. that an attachment was not an essential preliminary in an execution sale. The reason for this view is thus stated by the learned Judge :—

"Attachment is a measure resorted to by the decree-holder for his own protection and the protection of purchasers of the property to be sold, and it consists in the case of immoveable property merely in a prohibition by the Court by which the judgment-debtor is restrained from alienating the property previous to the sale. This, therefore, being merely a measure for the protection of the decree-holder and the purchasers of the property, the absence of it is not, it appears to me, an objection which the judgment-debtor is competent to raise."

In *Baboo Luchmeeput* v. *Baboo Lekraj Roy* (6) the same Court held that a sale without attachment was irregular ; but, as pointed out in *Kishory Mohun Roy* v. *Mahomed Mujaffar Hossain* (7), "as that was a case of sale of moveable property and the suit was one for damages, the Court was not called upon to decide whether the sale should be regarded as a nullity." Though the decision in *Sharoda Moyee Burmonee* v. *Wooma Moyee Burmonee* (5) was under the Civil Procedure Code of 1859 which did not contain a provision corresponding to O. 21, R. 64 of the present Civil Procedure Code, yet the reasoning of the learned Judge has been accepted and applied in deciding cases both under the Act of 1882 and under the present Code by our High Court. In *Muniappa Naick* v. *Subramania Ayyan* (8) on the ground that "the object of attachment is to take the property out of the disposition of

1. (1923) I L R 47 M 483 : 46 M L J 415 (F B) 5. (1867) 8 W R 9.
6. (1867) 8 W R 415. 7 (1890) I L R 18 C 188.
8. (1894) I L R 18 M 437: 5 M L J 60.

the judgment-debtor " the learned Judges, Muthuswami Aiyar and Best, JJ. held that the omission to attach under S. 274 of Act XIV of 1882 was only an irregularity. In *Ramaswami Naick* v. *Ramaswami Chetti* (9) it was held for the same reason that the sale in execution of a decree is not invalid although there has been no attachment before sale as required by the Code. These decisions and the decisions in *Kishory Mohun Roy* v. *Mahomed Mujaffar Hossain* (7) and *Sheodhyan* v. *Bholanath* (10) were followed by Sankaran Nair and Sadasiva Aiyar, JJ. in *Velayutha Muppan* v. *Subramaniam Chetti* (11) where they held that a sale of immoveable property in execution of a decree without the preliminary attachment is not null and void. This was a decision under the new Code. The latest reported decision of this Court is to be found in *Sivakolundu Pillai* v. *Ganapathi Aiyar* (12) where the learned Judges held that "attachment is only a step to be taken by the executing Court in bringing to sale the properties of a judgment-debtor. If such a step is omitted, the sale can be set aside only if it has resulted in substantial loss" and the absence of attachment does not affect the jurisdiction of the executing Court to sell the immoveable property. Our High Court has thus held in a series of decisions, both under the old Code and the present one, that the absence of attachment does not affect the jurisdiction of the executing Court to sell the property and that the sale on that account is not null and void. In *Sheodhyan* v. *Bholanath* (10) the learned Judges of the Allahabad High Court after an elaborate consideration of the object of attachment have also arrived at the same conclusion.

As against these decisions, which, if accepted, would entail the dismissal of his appeal, the learned Advocate-General relies upon a recent decision of the Calcutta High Court in *Panchanan Das* v. *Kunja Behari* (13) to the effect that a Court has no jurisdiction to sell a property in execution which had not been duly attached. The learned Judges base their conclusion upon a decision in *Sorabji Coovarji* v. *Kala Raghunath* (14), some observations of the Privy Council in *Thakur Barmha* v. *Jiban Ram Marwari* (15) and upon the terms of

7. (1890) I L R 18 C 188.
9. (1907) I L R 30 M 255 at 264 : 17 M L J 201
10. (1899) I L R 21 A 311. 11. (1912) 24 M L J 70.
12. (1917) M W N 89. 13. (1917) 42 I C 259.
14. (1911) I L R 36 B 156. 15. (1913) L R 41 I A 38: I L R 41 C 590 (P C).

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O. 21, R. 64, Civil Procedure Code. It is to be noticed that the learned Judges do not in their judgment refer to the earlier decisions of their Court in *Kishory Mohun Roy* v. *Mahomed Mujaffar Hossain* (7) and *Hari Charan Singh* v. *Chandra Kumar Dey* (16) which held that a sale is not to be considered as a nullity merely by reason of the absence of any attachment.

The observations of Scott, C. J. in *Sorabji Coovarji* v. *Kala Raghunath* (14) that "property can only be brought to sale after it has been duly attached and if the attachment came to an end upon the payment into Court on the 22nd September, 1909, the property was not duly attached at the time of the sale in January 1910" no doubt support the contentions of the appellant. We do not find in the course of the judgment any discussion of the case-law bearing on the question, nor an answer to the reasoning on which the view of the Madras and the Allahabad High Courts is based, namely, that an attachment is a measure resorted to for the protection of the decree-holder and the purchaser against intermediate alienations and is only a step to be taken by the executing Court in bringing to sale the properties of a judgment-debtor.

It is conceded in the judgment that the decision of the Privy Council is not exactly in point, but the following remarks of Lord Moulton are referred to as indicating the view of their Lordships that the property can only be sold when it has been duly attached: "Their Lordships are of opinion that this is a very plain case. That which is sold in a judicial sale of this kind can be nothing but the property attached, and that property is conclusively described in and by the schedule to which the attachment refers." The facts of the case and their Lordships' decision will clearly show that these observations only mean that a certificate of sale cannot be granted in which the property described is different from the property attached and specified in the proclamation of sale. In that case the judgment-debtor owned 16 annas share of a Mahal of which 10 annas share was mortgaged while the remaining 6 annas share were free from any mortgage. The proclamation of sale described the property to be sold as 6 annas share included in the mortgage. This was the property that was attached and sold in auction. An application was made on behalf of the auction-purchasers to obtain a sale certificate for the 6 annas share purchased by them at the auction. In

7. (1890) I L R 18 C 188. 14. (1911) I L R 36 B 156.
16. (1907) I L R 34 C 787.

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making this application they alleged that a mistake had been made in the schedule of the property to be sold in that the word "not" had been omitted from the description of the 6 annas in question and that the property should have been described as being 6 annas not mortgaged. They claimed that their certificate should be made out as being a certificate of the purchase by them of the 6 unencumbered annas instead of, as described in the schedule, "6 annas subject to the existing mortgage". The Subordinate Judge granted them a certificate in the form in which they desired. This order, upheld by the High Court, was set aside by the Privy Council. After the extract from the judgment already referred to, their Lordships state, "In the present case the property was 6 annas subject to an existing mortgage. The effect of the certificate of sale granted by the order of the Subordinate Judge is to make the sale that of a property not attached, namely, the 6 unencumbered annas, a property which could not be sold in such proceedings inasmuch as it was not the property attached." Later on their Lordships say: "In this case we have to deal with identity and not description." Their Lordships conclude thus: "It was beyond the powers of the Court to make such an order inasmuch as there was no power to sell in these judicial proceedings the property thus certified to have been purchased." It will thus appear that the extract quoted from their Lordships' judgment in *Panchanan Das* v. *Kunja Behari* (13) was only meant to indicate that the Court has no power to include in the sale certificate properties not attached and sold. Their Lordships were not called upon to consider directly the question whether the absence of prior attachment will deprive a Court of its jurisdiction to sell the properties in execution of a decree. Thus understood, it appears to me that the dictum of the Privy Council cannot be relied upon in support of the appellant's arguments.

The terms of O. 21, R. 64, Civil Procedure Code, no doubt show that attachment would ordinarily precede a sale of the properties in execution. But, for the reasons mentioned, the decisions above referred to have held that the absence of such attachment would not vitiate a sale.

In *Macnaghten* v. *Mahabir Pershad Singh* (17) the question whether the notice of attachment not having been properly published would affect the sale or be an irregularity in conducting the sale was raised before the Privy Council but

13. (1917) 42 I C 259. 17. (1882) I L R 9 C 656.

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was not gone into, inasmuch as that point was given up by the applicant at the trial before the Judge. In the absence of a definite pronouncement by their Lordships of the Privy Council I am not inclined to follow the decisions in *Panchanan Das* v *Kunja Behari* (13) and *Sorabji Coovarji* v. *Kala Raghunath* (14) in preference to the long course of decisions of this Court. Following these decisions the sale in this case can be set aside only if the Court is satisfied that the appellant has sustained substantial injury by reason of the irregularity complained of, namely, the absence of attachment. It has not been argued before us that he has sustained any such substantial injury and he has also not asked us to adjourn the hearing of this case till the disposal of the application filed by him in the Lower Court. It therefore follows that this appeal will have to be dismissed.

As I have decided to dismiss the appeal on the merits, I do not express any opinion as regards the "appealability" of the order passed by the Subordinate Judge.

In the result this Miscellaneous Appeal is dismissed with costs. The connected Civil Revision Petition is also dismissed but without costs. No orders are necessary on the stay petition.

A. S. V. *Appeal and Petition dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE SPENCER AND MR. JUSTICE RAMESAM.

The Official Assignee of Madras and as such the assignee of the estate and effects of K. S. Venkatarathnam Naidu, the insolvent ... *Appellant** (*Defendant*)

v.

Vedavalli Thayarammal and others ... *Respondents* (*Plffs.*).

The Official Assignee of Madras v. Vedavalli Thayarammal.

Indian Succession Act (*X of* 1865), *S.* 117—*Applicability—Will—Construction—Gift over—Prior bequest failing in a particular manner—Rule of strict construction—Rule in Tagore's case—Estate not vesting for some time—Effect of.*

A Hindu residing at Madras made a will, the material portion of which ran as follows:—"I give and bequeath the whole of the residuary estate to my grandson or grandsons who may be born or will be born to my son *S* within ten years after my death; if there shall be no such grandsons to be born as afore-

*O S Appeal No. 80 of 1924. 20th August, 1925.

13. (1917) 42 I C 259. 14. (1911) I L R 36 B 156.

said the whole of my residuary estate is to be divided equally between my said granddaughters after the death of my said wife." By a codicil he postponed the distribution of the residuary estate among the granddaughters till after the death of his wife, son and daughter-in-law. The testator died in 1897 leaving a widow, son and three granddaughters. A grandson was born in 1899. *Held*, on a construction of the will, *per curiam* (1) as regards the grandson born in 1899, the bequest in his favour being to a person not in existence at the death of the testator is invalid under the rule in the *Tagore case*, (1872) 9 Beng L R 377 (P C); (2) as the will provided that the gift over to the granddaughters was to take effect only if there was no grandson born within ten years of the testator's death but a grandson was actually born within ten years, the case fell within S. 117, Indian Succession Act, made applicable under the Hindu Wills Act, and the gift over would not take effect; and (3) the result was an intestacy, the grandson taking the whole estate as the heir-at-law.

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Scope of Ss. 116 and 117 explained; case-law referred to.

Per Spencer, J.—Where S. 117 applies, the condition subject to which the gift over is to take effect must receive a strict construction.

Per Ramesam, J.—The bequest to the granddaughters fails also because there is an interval after the testator's death when the estate is not vested in any person.

On appeal from the judgment of the Hon'ble Mr. Justice Kumaraswami Sastri passed in the exercise of the Ordinary Original Civil Jurisdiction of the High Court in C. S. No. 34 of 1924.

O. T. Govindan Nambiar and *S. Satagopa Mudaliar* for appellant.

A. C. Sampath Aiyangar and *P. Krishnamachari* for respondents.

The Court delivered the following

Spencer, J

JUDGMENTS :—*Spencer, J.* :—The decision of this appeal depends on the construction to be placed upon the will of K. Narayanaswami Naidu, a Hindu of Madras. He made a will on 3rd February, 1897, and a subsequent codicil on 21st May, 1897, and died on 23rd May, 1897 leaving a widow and one son, whose whereabouts are not known, and three granddaughters. One grandson, who is the 2nd defendant, was born in 1899 after the testator's death and, having become an insolvent, he is represented by the Official Assignee. The will having been made in the Presidency Town, the Hindu Wills Act is applicable to it, and S. 2 of that Act makes Ss. 116 and 117 of the Indian Succession Act applicable. Among the dispositions the important passages run as follows :—

"*Clause* 9. I give and bequeath the whole of the residuary estate to my grandson or grandsons who may be born or will be born to my son Kateri Sundararamanjulu Naidu within ten years after my death ; if there shall be

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no such grandsons to be born as aforesaid the whole of my residuary estate is to be divided equally between my said granddaughters after the death of my said wife."

The proviso to the clause provides that a sum should be placed in deposit in Messrs. Arbuthnot & Company's Bank to provide a monthly income for the maintenance of the testator's daughter-in-law, the widow of a son who died during his life-time, and for the distribution of the amount to his grand-daughters after her death. Cl. 13 provides that the testator's son, K. Sundararamanjulu Naidu, having fraudulently spent more than half of his father's earnings and having executed a release in his favour should have no claims whatever in and upon the testator's estate. Clause 2 of the codicil revokes a provision of Rs. 5,000 in cl. 3 of the will in favour of charity and cl. 3 provides that the distribution of the residuary estate among the granddaughters should take place after the death of the testator's wife, daughter-in-law and son.

The facts necessary for understanding the case are that the testator's son Sundararamanjulu Naidu disappeared and has not been heard of for 25 years, the testator's granddaughter Kothanayaki died unmarried in 1903, the 2nd defendant was born in 1899, that is, within ten years of the testator's death in 1897; but the bequest in his favour being a bequest to a person not in existence at the death of the testator is invalid under the rule in the *Tagore case* [*Ganendra Mohan Tagore* v. *Jatindra Mohan Tagore* (1)].

The question we have to decide in this appeal is whether the effect of the first of the passages quoted from cl. 9 of the will is, in the events that happened to create a gift to the granddaughters or an intestacy. The learned Judge in the trial Court decided in favour of the former alternative. He was of opinion that S. 116 of the Succession Act applied to this case rather than S. 117. He referred to two cases, *Narandas Vrijbhukhandas* v. *Bai Saraswati Bai* (2) and *Radha Prasad Mullick* v. *Rani Mani Dassee* (3) as being cases in point. *Narandas Vrijbhukhandas* v. *Bai Saraswati Bai* (2) is a case which dealt with a will executed in the mofussil and consequently it contains no discussions of the sections of the Succession Act. *Radha Prasad Mullick* v *Rani Mani Dassee* (3) followed the English case of *Jones* v. *Westcomb* (4). The case *Radha Prasad Mullick* v. *Rani Mani Dassee* (3) went on

1. (1872) 9 Beng. L R 377 (P C). 2. (1914) I L R 38 B 697.
3. (1906) I L R 33 C 947. 4. (1711) 1 Eq Cases Abr 248.

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appeal to the Privy Council and was confirmed on different grounds from those upon which the Calcutta High Court decided it. The decisive feature of that case was that there was no adoption in law because the authority given under the will for the widow and the executors to adopt was invalid.

S. 116 of the Succession Act runs as follows:—

"Where there is a bequest to one person and a bequest of the same thing to another, if the prior bequest fails the second bequest shall take effect upon the failure of the prior bequest although the failure may not have occurred in the manner contemplated by the testator."

This provides for cases of double contingencies as may be seen from the illustrations to the section, a subject which is discussed in Williams on Executors, 11th Ed., Vol. II, pp. 1014 to 1017.

Section 117 is as follows :—

"Where a will shows an intention that the second bequest shall take effect only in the event of the first bequest failing in a particular manner the second bequest shall not take effect, unless the prior bequest fails on that particular manner."

The illustrations to this section recall the facts of the cases of *Underwood* v. *Wing* (5) and *Wing* v. *Angrave* (6). The will before us declares that the gift over in favour of the granddaughters shall take effect only if there are no grandsons born within ten years of the testator's death. There was a grandson born within ten years of the testator's death, namely, the second defendant. The question is whether the prior bequest in favour of the grandson has failed in the particular manner denoted by the will.

It was argued that we should read the words "if there shall be no such grandsons to be born as aforesaid" as meaning, "if there shall be no grandsons born who can take the estate as aforesaid" or in other words "if the bequest in favour of grandsons fails on any account." I think that the language used is quite specific and that it cannot be given the meaning contended for by the respondent's vakil which involves a contradiction, viz., that grandsons born within ten years after the testator's death means grandsons born during his lifetime as they alone could take the estate. The testator clearly spoke of two classes of grandsons when he used the words "grandsons who may be born (*i. e.*, before my death) or will be born to my son K. Sundararamanjulu Naidu within ten years after my death." The gift in favour of the granddaughters has

5. (1855) 4 De G M & G 633. 6. (1860) 8 H L Cas 183.

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been made expressly dependent on the condition that there shall be no grandsons born during the testator's lifetime or within ten years of the testator's death. We cannot make a new will for the testator in the light of the events which happened. The wishes of the testator have to be given effect to so far as the Court is able to do so. We must therefore consider what the testator intended. It is evident from cl. 12 that he intended to disinherit his son and it may also be considered from the proviso to cl. 9 that he was in favour of benefiting his granddaughters to some extent, but he evidently preferred to benefit grandsons if any should be born within ten years of his death rather than his granddaughters. He wished to restrict the bequest to grandsons born within ten years as that was the period within which his son and daughter-in-law might be expected to have children but he showed no intention of disinheriting them altogether in case of there being a legal objection to the bequest taking effect in the manner stated. The will contains no indication that the testator wished to give preference to granddaughters supposing a grandson and granddaughters were both in existence at a date within ten years after his death. In *Hall* v. *Warren* (7) Lord Kingsdown observed:

"The gift over seems to have taken effect whether we regard the precise language of the particular clause or the general intention of the testator."

So here let us consider first what is the meaning of the precise language used by the testator, and secondly what were his general intentions and how may his wishes be best carried out. If the answers to both these questions lead to the same conclusion, we need have no hesitation in giving effect to the ordinary meaning of the language used. The testator did not contemplate intestacy, but he made no provision for the case of the bequest in favour of grandsons who might be born within ten years being found invalid owing to a provision of law. If he had contemplated the event, which actually happened, of a grandson being born within ten years of his death, there can be little doubt that he would have preferred that his grandson should succeed even though on intestacy, rather than that the granddaughters should take the whole estate and the grandson take nothing. The case of *Underwood* v. *Wing* (5) was a case in which the construction put upon a will by the Court of final appeal in England who gave effect to the intentions of the testator led to intestacy and the illustration (*e*)

5. (1855) 4 De G M & G 633.

7. (1861) 9 H L Cas 420.

to S. 92 and the illustration to S. 117 of the Succession Act are also illustrations of cases of intestacy resulting. We should not therefore assume that the idea of intestacy would have been more repugnant to the mind of the testator than the preference of female to male descendants. I think that this specific language of the will and the intention of the testator lead to the same conclusion. I further think that S. 117, Succession Act, covers the case and therefore I would, as was done, in *Maddison* v. *Chapman* (8), construe strictly the condition under which the granddaughters were to take the estate and hold that as a grandson was born, the gift over failed and the granddaughters are not entitled to take the residue, and that, as the gift to the grandson is invalid and the gift over to the granddaughters failed by reason of its being subject to a contingency which actually happened, there is an intestacy and the heir-at-law, namely, the 2nd defendant, in the absence of his father, who is presumably dead, will take the whole estate.

The appeal must therefore be allowed and the suit dismissed. Costs of the plaintiff and the Official Assignee in this Court will come out of the estate. The order as to costs in the trial Court may stand.

Ramesam, J. :—I agree but would add some reason of my own. The first illustration to S. 116 of the Succession Act is based on *Meadows* v. *Parry* (9). The second illustration is taken from *Avelyn* v. *Ward* (10). Other cases illustrating the section are collected in William on Executors (11th Ed.), Vol. II, pp. 1015-1017, Theobald on Wills, 7th Ed., pp. 656-657, Jarman on Wills, 6th Ed., pp. 2195-2199. The reason for these decisions is that "the intention of the testator is effectively fulfilled by regarding a clause of apparent condition, as a clause of conditional limitation, so as not to require, as in the case of a gift on the condition that the very event, on which the gift is made contingent must be fulfilled with strict exactness, but paying regard, in the construction to the substantial effect of the contingency specified and as to the real intent of the testator." (Williams, p. 104). In these cases "there cannot be a shadow of doubt that, if asked whether in case of a prior gift failing altogether for *want of an object* he meant the alternative gift to take effect, his answer would have been in the affirmative. The conclusion that such was the actual intention has been deemed to amount to what the law denomi-

8. (1858) 4 K & G 709.

9. (1812) 1 Ves & B 124.

10. (1750) 1 Ves Sen 420.

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nates a necessary implication." (Jarman, p. 2195). The Indian legislature has accordingly adopted the principle as a general rule in S. 116 of the Act making the case where the testator intends the gift over to take effect *only* if the first gift fails in a particular manner, an exception. Accordingly, the appellant has to show an intention that the second gift in this case should take effect only if there is no grandson born within ten years. If the appellant fails to show such an intention, the respondent succeeds even if he cannot show any clear intention the other way.

In many of the cases illustrating S. 116 the intention of the testator is so obvious that it cannot bear discussion. For instance, in the first illustration [cf. *Meadows* v. *Parry* (9)] by the time of the death of the testator, from which time the will takes effect, it was definitely known that the testator had no children though it might not have been known when the will was written and the testator could not have intended the second gift to take effect only if children are born but die within eighteen. The language of the clause could not have been the actual intention of the testator at the date of death. The same remarks apply to *Murray* v. *Jones* (11) and to *Avelyn* v. *Ward* (10) though not to *Jones* v. *Westcomb* (4) or to *Hall* v. *Warren* (7) or to *Radha Prasad Mullick's case* (3) [affirmed by Privy Council (12)]. It seems to me that, if the word "contemplated" in the section refers to the testator's state of mind on the date of death and not to the language in the will, the illustrations do not illustrate the section and the section is not happily worded: for the manner contemplated by him could not be the manner apparently expressed in the condition. Even in *Jones* v. *Westcomb* (4), *Hall* v. *Warren* (7) and *Radha Prasad Mullick* v. *Rani Mani Dassee* (3) there is no doubt as to what the testator's answer would have been, if the matter was put to him. As Lord Campbell stated in *Hall* v. *Warren* (7), "It was gravely argued at your Lordship's Bar that the testator wished the opinion of the inhabitants of Bayswater to be taken on the expediency of establishing this Hospital, and that a resolution of the Parish in the negative was the condition on which William Hall Warren was to take the two houses. But I apprehend that the failure of the foundation

3. (1906) I L R 33 C 947.
4. (1711) 1 Eq Cas Abr 245.
7. (1861) 9 H L Cas 420.
9. (1812) 1 Ves & B 124.
10. (1750) 1 Ves Sen 420.
11. (1813) 2 Ves & B 313.
12. (1908) I L R 35 C 896: 18 M L J 287 (P C).

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of the Hospital was the contingency on which he intended his godson to take." There can be no analogy between that case in which the Hospital never came into existence and the present case in which a grandson had come into existence.

The illustration to S. 117 is based on *Underwood* v. *Wing* (5) and *Wing* v. *Angrave* (6). That the result of these cases involved a hardship is clear from the observations of Lord Wensleydale in the latter case at pp. 214-15. "This case (and there are many like it) is one in which the temptation from the supposed hardship of the case to swerve from the established rules of construction is strong. No one can doubt as to the testatrix's 'intention' in the loose sense of the word" then his Lordship relied on the language of the instrument. In the present case, I do not wish to rely merely on the language of the condition. Nor can it be said in the present case that the testator's 'intention' in the loose sense of the word was to give the residue to the granddaughters even if a grandson existed. This case is therefore stronger than the cases of *Wing* v. *Angrave* (6) and *Underwood* v. *Wing* (5). Seeing that the English Judges decided these cases in the way they decided in spite of the principle of the other group of cases [*Jones* v. *Westcomb* (4), *Murray* v. *Jones* (11) and etc.], and in spite of the hardship involved and seeing that the Indian legislature adopted those decisions as their illustration to S. 117 to show what they meant by "an intention that the second bequest shall take effect only in the event of the first bequest failing in a particular manner" I do not feel any hesitation in applying S. 117 to the case before us. The illustration in (*e*) to S. 92 also leads to the same conclusion. It seems to be based on the passage in Jarman, 6th Edition, at page 2203. This illustration might well have been an illustration to S. 117 also. It likewise relates to the intention of the testator that the second gift should not take effect unless the failure of the first happens in a particular manner.

If, in *Wing* v. *Angrave* (6) as Theobald puts it (at p.654) that the event that happened (simultaneous death) and the event contemplated (one dying before the other) are two distinct and independent events and if in illustration (*e*) to S. 92 the death of the first legatee before the eighteenth year and his death after the eighteenth year in the lifetime of the testator

4. (1711) 1 Eq Cas Abr 245.
5 (1855) 4 De G M & G 633.
6. (1860) 8 H L Cas. 183.
11. (1815) 2 Ves & B 313.

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Ramesam, J.

are two distinct and independent events, in the present case the event contemplated—non-existence of the grandson and the event that happened—the birth of a grandson are not only two distinct and independent events but contrary or opposite events. The case in *Elliott* v. *Smith* (13) is a further illustration of the rule. Section 117 is therefore applicable *a fortiori*.

The consideration that the Court should, if possible, lean against intestacy is not sufficient in my opinion to shake the above conclusion. In *Underwood* v. *Wing* (5), *Wing* v. *Angrave* (6) and the illustration to S. 92 (*e*) this consideration was not strong enough to affect the result. I am not able to follow our learned brother Kumaraswami Sastri, J., when he says in his judgment in appeal "Reference was made to *Underwood* v. *Wing* (5), but I do not think that the facts of the present case fall under this decision as I do not think that limitation was a condition precedent."

It cannot be deduced from *Hall* v. *Warren* (7) as the learned vakil for the respondent argued that whenever the first devise is *ab initio* void, the second bequest must be given effect to, whatever the condition may be. He also wished us to construe the words "such grandson as aforesaid" to mean "such grandson so taking." I think that the words mean "grandson born within ten years after my death." We cannot add the words "so taking" as we have been invited to do on the basis of S. 64 of the Act and *Abbott* v. *Middleton* (14). It cannot be said that any words material to the full expression of the meaning are omitted in this case. Nor can we construe the will as a gift to the granddaughter subject to be defeated on the birth of a grandson within ten years after the testator's death. The mere fact that the testator wished to deprive his son of all the benefits of the will beyond the sum of Rs. 500 as capital for his trade and Rs. 250 for funeral expenses is not also strong enough to displace the application of S. 117, for, in case of intestacy, the son and grandsons take as members of a joint Hindu family if grandsons are born with the right to enforce partition by or on behalf of grandsons. But it is unnecessary to speculate in this direction as the testator never contemplated the event that happened, viz., the device to the grandsons being void under the *Tagore case* (1).

1. (1872) 9 Beng L R 377 (P C).
5. (1855) 4 De G M & G 633.
6. (1860) 8 H L Cas 183.
7. (1861) 9 H L Cas 420.
13. (1882) 22 Ch D 236.
14. (1858) 7 H L Cas 68.

The Official Assignee of Madras v. Vedavalli Thayar-ammal.

Kamesam, J.

Our brother Kumaraswami Sastri, J., thought that the decision in *Narandas* v. *Saraswathi Bai* (2) is on all fours with the present case. In that case, the testator wished to give life-estate to his widow Parvathi and on her death to his daughter's sons. He expected his daughter to have sons by the death of Parvathi. Not only did he not contemplate the gift to the daughter's sons being void under the *Tagore case* (1) but also he did not provide for the case of his daughter having no sons at Parvathi's death but having sons some time after it. Either he did not contemplate it or thought a gift to them valid though it may not immediately follow the preceding life-estate. The events that happened are incompletely stated in the reports in the Indian Law Reports, a material date being omitted. The case is reported also in 16 Bombay Law Reporter, page 577; from this report it appears that Saraswati's son was born in December, 1907. As the son did not come into existence on the termination of the preceding life-estate, Parvathi having died in April, 1907, the gift to him was void, apart from the Tagore case. On the analogy of S. 111 of the Succession Act (*cf.* S. 23 of the Transfer of Property Act) the clause "My daughter Saraswathi's sons, if any, shall be the heirs" should be construed to relate to the termination of the preceding life-estate, *i. e.*, to the time of Parvathi's death. It then means "My daughter Saraswathi's sons if any existing at the time of Parvathi's death shall be the heirs." As Saraswathi's son was born later he could not take. The question then arises whether there is an intestacy on the death of Parvathi. The testator proceeded to give a life-estate to Saraswathi, "In case my daughter may not have sons." This clause can mean only "In case my daughter may not have sons at the time of Parvathi's death," in which case, Saraswathi's life-estate takes effect, and there is no alternative possible at this stage so as to result in intestacy. The clause is not a condition subsequent defeating Saraswathi's life-estate on the birth of a son later than Parvathi's death. The question next arises—do the cousins take after Saraswathi's death? It may be said that the words "after the death of my daughter Saraswathi" (towards the end of paragraph quoted in the report) may be construed as if the words "without sons" are added to them, on the principle of *Abbott* v. *Middleton* (14), but if this cannot be done, the cousin's estate takes effect—

1. (1872) 9 Beng L R 377 (P C). 2. (1914) I L R 38 B 697.
14. (1858) 7 H L Cas 68.

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which is the actual decision. The decision may be perhaps correct. But it is difficult to see where the principle of *Jones* v. *Westcomb* (4) and similar cases on which S. 116 of the Succession Act was based came in or the necessity for discussing whether S. 116 or S. 117 applied arose. In that case, there was a life-estate before the grandson's estate but no life-estate in the case before us. I do not see how that case can be on all fours with the one before us. Neither the Hindu Wills Act nor the Succession Act applied to it as the case did not arise in the City of Bombay. Nor was there any reference to Ss. 116 and 117 of the Succession Act, nor any discussion as between two opposing principles.

But there is another ground on which the bequest to the granddaughters fails. The testator intended the estate to wait for ten years after his death, and, if by that time grandsons are born (through his son) they shall take but, if no grandsons are born, the three granddaughters named shall take. The disposition in favour of the grandsons does not vest until the birth of the first grandson within ten years after the testator's death. Until then, the estate does not vest in any person. If no grandson is born within ten years, then also the estate does not vest in any person for ten years or up to his son's death if within that time. As S. 179 of the Indian Succession Act is not made applicable to Hindus, the estate does not vest in the executors. The result is, in either case, there is an interval after the testator's death during which the estate is not vested in any person. On this ground (apart from the Tagore case) the disposition in favour of the grandson is void and that in favour of the granddaughters is likewise void. The vakil for the respondent conceded this and even relied on this for inviting us to construe the will as devise to the granddaughters in the first instance, subject to be defeated by the birth of a grandson competent to take. This will be re-writing the will. Thus there is an intestacy on this ground also.

I agree with the order of my learned brother.

T. S.V. *Appeal allowed.*

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4. (1711) 1 Eq Cas Abr 245.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE PHILLIPS AND MR. JUSTICE MADHAVAN NAIR.

Krishnaswami Chettiar and another ... *Petitioners** (*Petitioner and nil*)

v.

Ghulam Muhammad Ghouse Saheb and another .. *Respondents* (*Respondents and 2nd petitioner*).

Krishnaswami Chettiar v. Ghulam Muhammad Ghouse Saheb.

Madras Local Boards Act—Rule 1 of Rules under—Election petition—Maintainability—Nomination of only one candidate for Presidentship of Local Board—Election petition in case of—Election—Meaning.

Where only one candidate for the Presidentship of a Local Board has been nominated and in accordance with the rules has been deemed to be elected, an election petition will not lie against his appointment.

Election means selection of one out of two or more and therefore the return of a solitary candidate is not, strictly speaking, an election by the electors, for the electors have had no say whatever in the matter.

Petition under S. 115 of Act V of 1908 and S. 107 of the Government of India Act praying the High Court to revise the order of the Court of the Subordinate Judge of Cuddalore in O. S. No. 44 of 1925.

T. R. Ramachandra Aiyar and *S. R. Dikshit* for petitioner.

T. M. Krishnaswami Aiyar and *S. Srinivasa Aiyar* for respondents.

The Court delivered the following

JUDGMENT :—The question here is whether where only one candidate for the Presidentship of a Local Board has been nominated and in accordance with the rules has been deemed to be elected, an election petition will lie against his appointment. The question has been considered by Jackson, J. in *Srinivasa Chariar* v. *Venkatarama Aiyar* (1) and he has come to the conclusion that no such petition will lie. His opinion is based on the wording of R. 1 of the Rules for the Decision of Disputes. This decision is in a case under the Madras District Municipalities Act, whereas the question here arises under the Madras Local Boards Act, but the rules framed under each of these Acts are practically identical. The important words are in R. 1, that is,—

"No election......... shall be called in a question except by an election petition.............. by any candidate or elector against the candidate (herein-

*C R P No. 1166 of 1925. 10th March, 1926.

1. (1924) 47 M L J 762.

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after called the returned candidate) who has been declared by the President of a Local Board to have been duly elected."

In the present case a successful candidate who can hardly be called the "returned candidate" as he was the only one nominated has not been declared by the President of the Local Board to have been duly elected, but under the rules he is deemed to have been elected. Similarly, it is difficult to hold that there was any other candidate who could present a petition or even any elector when no election has been held. Election means selection of one out of two or more and therefore the return of a solitary candidate is not, strictly speaking, an election by the electors, for the electors have had no say whatever in the matter. For these reasons we agree with the view taken by Jackson, J. The authority to the contrary in *Sarvothama Rao* v. *The Chairman, Municipal Council, Saidapet* (2) is hardly in point, because this question was not argued before that Bench. The question there was whether Civil Courts had jurisdiction to entertain certain suits, and there is an observation in the judgment that the remedy lay by means of an election petition, but the point now taken was not discussed there. The petition is accordingly dismissed with costs.

A.S.V. *Petition dismissed.*

[FULL BENCH.]

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE KRISHNAN, MR. JUSTICE RAMESAM AND MR. JUSTICE BEASLEY.

C. S. Govindaraja Mudaliar, Receiver, Sri Komaleswara Temple Properties ... *Appellant** (*Plaintiff*)

v.

Alagappa Thambiran and others ... *Respondents* (*Defendants*).

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Govindaraja Mudaliar v. Alagappa Thambiran.

Civil Procedure Code, O. 1, R. 3—Misjoinder of defendants and causes of action—Temple trustee—Leases granted by, to different tenants separately on different dates of different portions of temple property—Suit by succeeding trustee to set aside, and to recover portions of property so demised from different tenants respectively—If bad for misjoinder—Applicability of R. 3—Conditions.

In a suit brought under S. 92, Civil Procedure Code, to remove the trustees and to frame a scheme, etc., the plaintiff was appointed Receiver and was direct-

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*O S Appeal No. 5 of 1924. 24th March, 1926.

2. (1923) I L R 47 M 585 : 45 M L J 23.

ed to recover the temple properties. He brought a suit to set aside a number of leases granted by the previous trustee of various portions of one block of temple property to different tenants separately on different dates and to recover the portions thereof so demised from them respectively.

On a question referred to the Full Bench whether the suit was bad for misjoinder of parties and causes of action, *held*, that it was not.

Per Krishnan, J.:—Two conditions are necessary to be fulfilled for the application of O. 1, R. 3, Civil Procedure Code, namely, that the relief claimed should arise from a series of acts or transactions, the words "series" implying that there should be some connection between them, and that there must be some common question of law or fact arising in the suit. There is nothing in the rule that confines it to a single cause of action. Both the conditions are fulfilled in the present case. There are two questions arising in the case which are common to all the defendants, (1) whether the alienations are valid in the circumstances alleged by the defendants in their written statements, and (2) whether in any case plaintiff cannot recover possession but only get the term reduced to 21 years or such other period as the trustee was competent to grant. There is unity of title in the plaintiff as he claims as the proper present representative of the temple estate to set aside the alleged improper alienations of the previous trustee. The series of transactions impugned are the various 99-year leases granted by the previous trustee. They are all similar and depend for their validity on the powers of that trustee. They form a series of transactions within the meaning of R. 3.

On appeal from the order of the Hon'ble Mr. Justice Devadoss, dated 27th September, 1923 and passed in the exercise of the Ordinary Original Civil Jurisdiction of the High Court in C. S. No. 539 of 1921.

K. S. Krishnaswami Aiyangar, Counsel, instructed by *A. Kandaswami Mudaliar*, Attorney for appellant.

K. Krishnamachariar and *V. Narasimha Aiyangar* for respondents.

The Court (Coutts Trotter, C. J. and Ramesam, J.) referred the case to a Full Bench, stating the following question of law, viz.:—

"Is a suit brought by a Receiver of the temple properties to set aside a number of leases granted by a previous trustee of the temple of various portions of one block of property to different tenants separately on different dates and to recover the portions thereof so demised from them respectively bad for misjoinder of parties and causes of action?"

The Court delivered the following

JUDGMENTS:—*Krishnan, J.*:—The question referred to the Full Bench is whether "a suit brought by a Receiver of temple properties to set aside a number of leases granted by a previous trustee of the temple, of various portions of one block of property, to different tenants separately on different dates and to recover the portions so demised from them res- Krishnan, J.

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pectively is bad for misjoinder of parties and causes of action ".

In a suit brought under S. 92 of the Code of Civil Procedure to remove the trustee and to frame a scheme, etc., plaintiff was appointed Receiver and was directed to recover the temple properties. The suit properties are held by the various defendants under several leases all for 99 years granted by the trustee. Plaintiff claims that it was beyond the powers of the trustee to grant leases for such a long period and seeks to invalidate them on that ground and to recover the properties ejecting the defendants. Defendants urge, among other pleas, that the alienations are valid in the circumstances alleged by them in their written statements and that in any case plaintiff cannot recover possession but only get the term reduced to 21 years or such other period as the trustee was competent to grant. These are two of the questions that arise in the case which are common to all the defendants.

The question referred for our opinion has obviously to be decided on the allegations in the plaint and on the provisions of the Code of Civil Procedure as it now stands.

The principal rule we are concerned with is O. 1, R. 3, which allows the joinder in one suit of a number of defendants against whom any right to relief in respect of or arising out of the same act or transaction or series of acts or transactions is alleged to exist jointly, severally or in the alternative, where if separate suits were brought against such persons any common question of law or fact would arise. There is a considerable difference between the language of this rule and that of S. 28 of the Code of 1882 which was the previous law on the point. The rule is now in accordance with the English Rule, R. S. C. O. 16, R. 4. The older authorities are therefore not of much force now though they are still useful guides as Justice Davar observes in *Umabai* v. *Bhau Balwant* (1). Though R. 3 in terms applies only to joinder of defendants it impliedly refers to joinder of causes of action also as held by the learned Judges of the Calcutta High Court in *Ramendra Nath Roy* v. *Brajendra Nath Dass* (2). They have referred to the English authorities on the point and as I entirely agree with them it is unnecessary to refer to such authorities again.

Two conditions are necessary to be fulfilled for the application of O. 1, R. 3, namely, that the relief claimed should

1. (1908) I L R 34 B 358 at 367. 2. (1917) I L R 45 C 111.

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arise from a series of acts or transactions, the words "series" implying that there should be some connection between them, and that there must be some common question of law or fact arising in the suit. There is nothing in the rule that confines it to a single cause of action. Now it seems to me that both the conditions above stated are fulfilled in the present case. I have already mentioned above the two common questions that arise for decision. There is unity of title in the plaintiff as he claims as the proper present representative of the temple estate to set aside the alleged improper alienations of the previous trustee. The series of transactions impugned are the various 99-year leases granted by the previous trustee. They are all similar and depend for their validity on the powers of that trustee. They form in my opinion a series of transactions within the meaning of R. 3. I think the rule applies to this case and that the suit is not bad for multifariousness. While on the one hand we should not allow the Court to be embarrassed by the joinder of a number of totally unconnected controversies in one suit we should not unduly restrict the scope of the rules regarding the joinder of parties and causes of action so as to lead to unnecessary multiplicity of suits. If any inconvenience is felt by the joinder of a number of causes of action it is always open to the Court to take action under O. 2, R. 6. It may be that the plaintiff can bring a separate suit against each lessee but that is no reason why he should be driven to do so. Order 1, R. 3 itself contemplates the possibility of separate suits. It is desirable where there are common questions of law or fact to decide, that they should be decided in one suit rather than in many to avoid possible conflict of decisions. In the case of several alienations by a single individual which are all alleged to be improper it is better that they should all be before the Court at once to secure a proper decision as to all of them. These are the observations made by the Full Bench in *Vasudeva Shanbhaga* v. *Kuleadi Narnapai* (3) and they are still of value as guiding principles.

The next Madras case referred to is the case of *Mahomed* v. *Krishnan* (4). In that case the learned Judges pointed out that in a suit by the junior members of a tarwad to recover a number of tarwad properties improperly alienated by the karnavan the primary ground of action was the interest vested in the plaintiffs to the whole of the property in suit and that

3. (1874) 7 M H C R 290 (F B) 4. (1887) I L R 11 M 106.

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there was unity of title and the claim arose from the same cause of action though there were numerous alienees unconnected with one another holding the various items in suit. This principle has consistently been followed in this Court and, in suits by reversioners, by adopted sons, and by co-parceners for partition, the joinder of any number of alienees is permitted without any objection on the ground of misjoinder.

The same view is taken in Calcutta. In *Nundo Kumar Naskar* v. *Banomali Gayan* (5) following the ruling in *Ishan Chunder Hazra* v. *Rameswar Mondol* (6) it was held that a lessee could bring a single action against his lessor and a number of subsequent lessees from him for ejectment and that it was not bad for misjoinder. The point was again elaborately considered in *Ramendra Nath Roy* v *Brajendra Nath Dass* (2) where the corresponding rules of the Supreme Court and the English authorities on them are referred to at length. I entirely agree with the view expressed by the learned Judges in that case regarding the principle of the applicability of O. 1, R. 3.

The case in *Afzal Shah* v. *Lachmi Narain* (7) was cited on the other side. But it seems to me that the scope and effect of O. 1, R. 3 has not been properly considered in it. If the case was one of an owner of property suing to eject a number of wholly unconnected trespassers on different portions of his property as their Lordships say on page 11, it would be bad for misjoinder for it is difficult to bring it under O. 1, R. 3. It is in that view quite different from the present case as the defendants here are all lessees holding under a similar lease given by the trustee and the plaintiff is seeking to set aside all of them on the same ground.

For the reasons stated above, I would hold that the suit is not bad for misjoinder of parties and causes of action and answer the question referred to in the negative. As no other point has been decided by the trial Judge and as, I think, he is wrong in the view he has taken, and, as the parties agree to such a course, I would set aside his order and direct him to proceed with the further trial of the case. The costs of this appeal will be disposed off by the trial Judge in his final decree.

Ramesam, J.

Ramesam, J.:—This is an appeal from the order of our brother Devadoss, J., sitting on the Original Side. The appellant before us is the plaintiff. He is the Receiver of Sri

2. (1917) I L R 45 C 111. 5. (1902) I L R 29 C 871.
6. (1897) I L R 24 C 831. 7. (1917) I L R 40 A 7.

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Komaleswara Temple properties appointed by order of Court dated the 27th July, 1920 passed in C. S. No. 429 of 1916 on the file of the High Court. In that capacity he sues for recovery of certain properties belonging to the temple on the ground that the various leases under which the respective defendants are in possession and which were executed by or in favour of the former trustees are voidable at the instance of the present plaintiff. Defendants 1 and 2 are interested in plot 18.. Five other defendants are interested in five other distinct plots. Defendants 6 and 7 are interested in two plots and defendants 8 and 9 in another plot. A preliminary issue was framed "Is the suit bad for misjoinder of parties and causes of action?" This was first argued. The learned Judge held that the frame of the suit was bad for multifariousness and he passed an order giving leave to the plaintiff to proceed with the suit against such one of the defendants as he may choose and withdraw it against the others. The plaintiff appeals.

In *Vasudeva Shanbhaga* v. *Kuleadi Narnapai* (3) it was held that a suit brought against a number of alienees of a deceased member of an undivided family for the recovery of family property illegally alienated by him is not bad for multifariousness. In *Mahomed* v. *Krishnan* (4) the suit was brought by the junior members of a tarwad against the karnavan and his alienee. The plaintiff prayed for the removal of the karnavan, for a declaration that his alienations are invalid against the tarwad and for possession of the property alienated among other reliefs. It was held that the suit was not bad for multifariousness and the earlier case was followed. There were 48 alienations. Muthuswami Aiyar, J., observed:

> "In our judgment, it makes no difference whether the right enforced is that of a co-parcener or a reversioner, for the object in both is to reduce to possession a vested interest as well in property illegally alienated as in the property held by the managing member or by the tenant for life. In the view that the primary ground of action is the interest vested in possession as regards the whole of the property in suit, there is a unity of title, and the claim made is one in respect of the same cause of action."

In *Abdul* v. *Ayaga* (8) the same view was again taken, the suit being for a declaration that alienations by the karnavan were not binding on the tarwad. It was said there is no reason why a declaratory suit should be treated differently

3. (1874) 7 M H C R 290 (F B). 4. (1887) I L R 11 M 106.
8. (1889) I L R 12 M 234.

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from a suit for possession inasmuch as the title to be adjudicated upon were the same in both. In *Byathamma* v. *Avulla* (9) it was held that the suit by a karnavan to recover properties given away by a former karnavan was not bad for multifariousness. So much is this doctrine established in this Court that in A. S. No. 182 of 1896 (unreported) it was held that a reversioner was bound to include all the alienations made by a widow and questioned by him in one suit so that a second suit would be barred under S. 43 of the Civil Procedure Code. This case was considered in *Dampanaboyina Gangi* v. *Addala Ramaswami* (10). Bhashyam Aiyangar, J., observed:

"It purports to be based upon a course of decisions in this Presidency in which it was held that a suit relating to various properties in the possession of different defendants who claimed under different alienations made by a widow or by a karnavan or the managing member of a tarwad or a joint Hindu family, is not open to the objection of misjoinder of defendants and of causes of action, when the plaintiff's ground of title to all the properties included in the suit is the same..........A person suing for partition of an estate or for an estate which has devolved upon him by inheritance may so shape his plaint as to base it upon a single cause of action, the various defendants being joined as parties in possession of the estate. Further, under S. 28, Civil Procedure Code, relating to the joinder of different persons as defendants, it is open to a plaintiff to join as defendants various persons against whom the right to relief is alleged to exist, whether jointly, severally or in the alternative in respect of the same matter."

It would be noted that the phrase "in respect of the same matter" occurring in this section is wider than the phrase "in respect of the same cause of action" occurring in S. 26, Civil Procedure Code, relating to the joinder of different persons as plaintiffs in the same suit. In *Ishan Chunder Hazra* v. *Rameswar Mondal* (6) it was held, following the decision of this Court in *Vasudeva Shanbhaga* v. *Kuleadi Narnapai* (3) and *Mahomed* v. *Krishnan* (4) that " In a suit for ejectment against several defendants who set up different titles to various parts of the land claimed, there was only one cause of action" and it was observed that in England in an action in ejectment all the parties in possession are joined. Under the English Law, the persons to be made defendants in an action in ejectment, *i. e.*, to be named in the writ, are all the persons in possession of the land sought to be recovered; and the person who have a right to defend an action of ejectment are not only the persons named in the writ, but also any

3. (1874) 7 M H C R 290 (F B). 4. (1887) I L R 11 M 106.
6. (1897) I L R 24 C 831. 9. (1891) I L R 15 M 19.
10. (1902) I L R 25 M 736 at 745 : 12 M L J 103.

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person who is in possession by himself or his tenant (Rr. 112 and 113, pp. 494-98, Dicey's "Parties to an Action," Edn. of 1870). As to cases in which different persons are in possession of different portions of the property, the rule laid down in Cole on "Ejectment" (P. 76) is as follows:—

"When the tenements claimed and the tenants thereof are numerous, it is frequently advisable to bring two or more distinct ejectments rather than one action against all of them for the whole of the property. The exercise of a sound discretion and judgment on this point may sometimes save much trouble. ....Whether the action is based only upon one cause of action or not will depend upon the frame of the plaint in a suit for ejectment and not upon the answers to the suit which may be set up by the different defendants. Even if the plaint is not based upon one and the same cause of action, yet if the relief that is claimed severally against the different defendants be in respect of the same matter, S. 28, Civil Procedure Code, will save it from the objection of multifariousness."

In my opinion, the above sentences quoted from *Dampanaboyina Gangi* v. *Addala Ramaswami* (10), though strictly *obiter dicta*, as the point in that case is to applicability of S. 43, (now O. 11, R. 2) lay down the correct principle on the question of multifariousness. *Indar Kuar* v. *Gur Prasad* (11), *Mazhar Ali Khan* v. *Sajjad Hussain Khan* (12), *Ishan Chunder Hazra* v. *Rameswar Mondol* (6) and *Nundo Kumar* v. *Banomali Gayan* (5) are other decisions laying down the same principle. In *Ishan Chunder Hazra* v. *Rameswar Mondol* (6) the Court observed:

"The cause of action, namely, what the plaintiffs were bound to prove in order to succeed was that they were the reversioners of Brahmamayi in regard to this property and that the claim was not barred by limitation. The defendants then could raise any answer they thought fit to get rid of the claim; but the cause of action was one."

Whatever difficulty one may feel as to whether the cause of action in such cases is the same, certainly it ought to be held that they relate to the same matter as pointed out in *Dampanaboyina Gangi* v. *Addala Ramaswami* (10). The same remarks apply to *Nundo Kumar Naskar* v. *Banomali Gayan* (5). All these cases were followed in *Parbati Kunwar* v. *Mahmud Fatima* (13). Now it may be said and there is some force in the contention that a mere unity of title is not enough to save a suit from the mischief of multifariousness. For instance, if several properties belonging to *A* the owner of a land have been trespassed upon by different persons at different times

5. (1902) I L R 29 C 871. 6. (1897) I L R 24 C 831.
10. (1902) I L R 25 M 736 : 12 M L J 103.
11. (1888) I L R 11 A 33 12. (1902) I L R 24 All 358.
13. (1907) I L R 29 A 267.

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can it be said that *A* may bring one suit in ejectment against all the trespassers I find some difficulty in saying that a single suit will lie. [Vide *Afzal Shah* v. *Lachmi Narain* (7) cited by Devadoss, J.]. But where the unity of the title in the plaintiff is coupled with the fact that his predecessor was a limited owner or a person under a disability such as a minor or the idol of a temple and the alienations were made by a guardian or the trustee of the temple such a fact makes the plaintiff's suit one in respect of the same matter. It may be that in the trial of such a suit the total income of the property vested in the widow, the minor, the idol or the manager of a joint family or a tarwad has to be considered and all the circumstances of the owner or the institution have to be taken into account in judging the question of the justifying necessity in considering the various alienations sought to be impeached. The possibility of the necessity of such an enquiry is probably the unifying element which makes the suit relate to the same matter. The case of the trustee of a temple was always regarded in several respects similar to that of a guardian of an infant, heir or manager of a joint family [*see*, for instance, *Konwar Doorganath Roy* v. *Ram Chunder Sen* (14)]. Mr. Krishnamachariar appearing for the respondents contended, though this principle is correct in a suit for possession by a reversioner it will not apply in a suit for declaration. I do not see any reason why there should be a distinction made between a suit for declaration and a suit for possession. The case in *Abdul* v. *Ayaga* (8) already cited is a case where the plaintiff sued for declaration only. The present Civil Procedure Code though it does not use the words "the same matter" as in the Code of 1882, refers to a transaction or a series of transactions the object being to widen the scope of the cases permitting joinder. In A. S. No. 78 of 1911 (unreported) a suit by the trustee of a temple to set aside two alienations of the former trustee was held not to be bad for multifariousness and the decree was reversed and the suit remanded by Sankaran Nair and Spencer, JJ.

None of the above authorities have been cited before the learned Judge. He relied upon a passage in *Sethuratnam Aiyar* v. *Venkatachela Goundan* (15). No question of multifariousness was raised in the case. Before the Privy Council the plaintiff himself complained that evidence relating to

7. (1917) I L R 40 A 7. 8. (1889) I L R 12 M 234.
14. (1876) L R 4 I A 52 : I L R 2 C 341 (P C).
15. (1919) I L R 43 M 567 : 38 M L J 476 (P C).

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one item should not have been used against him for other items. The Privy Council observed that he himself was responsible for the joinder and ought not to complain. I therefore hold that the suit is not bad for multifariousness. The order will therefore be reversed and the suit sent back for disposal according to law, and I agree with my learned brother Krishnan, J.'s order as to costs.

Beasley, J.

Beasley, J. :—I have read the judgments of my learned brothers and am in entire agreement with them, and have nothing further to add.

A. S. V. *Order set aside : Suit remanded.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—SIR VICTOR MURRAY COUTTS TROTTER, *Chief Justice* AND MR. JUSTICE RAMESAM.

S. K. Mohideen Batcha Sahib ... *Appellant** (*Plaintiff*)

v.

K. A. Sheik Dawood Sahib and others ... *Respondents* (*Dtfts.*)

Mohideen Batcha Sahib v. Sheik Dawood Sahib.

Principal and surety—Surety—Remedy of, to prevent recovery of entire debt from him by creditor acting in collusion with principal debtor—Suit for declaration of his right to be indemnified—Maintainability before actual payment.

In one sense all sureties are only joint debtors so far as the creditor is concerned. But in a special sense, a surety is only a surety and not a joint debtor though the creditor is entitled to a joint and several decree or even can exclusively sue the surety. In either case, if the amount is exclusively recovered by the creditor from the surety or one of the debtors who has not received its benefit at the time of the borrowing, it can be recovered from the principal debtor or the joint debtor respectively. But the exact form of the transaction is important. If a person is only a surety, he can be indemnified in an appropriate case, before actual payment, by an anticipatory action.

Appeal against the decree of the Court of the Additional Subordinate Judge of Coimbatore in O. S. No. 26 of 1925 (O. S. No. 17 of 1925, Principal Sub-Court, Coimbatore).

The Advocate-General, T. M. Krishnaswami Aiyar and *N. Rajagopal* for appellant.

S. T. Srinivasagopalachariar and *S. Varadachariar* for 1st defendant-respondent, and *C. V. Anantakrishna Aiyar* for 4th respondent.

The judgment of the Court was delivered by

Ramesam, J.

Ramesam, J. :—It will be convenient to set forth the facts of this appeal by the plaintiff as it arises out of a suit "of an unusual character." The 1st defendant (Sheik Dawood) and his brother the late Kadir Mohideen carried on business

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*Appeal No. 290 of 1925. 5th March, 1926.

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under the name and style of K. Allauddin Sahib and Sons. The plaintiff is a father-in-law of the 1st defendant, but the 1st defendant has since discarded the plaintiff's daughter and married another wife, the daughter of the 4th defendant. In 1919 when the transactions commenced, no such misunderstandings existed between the plaintiff and 1st defendant. The brothers executed Ex. D in March, 1919 in favour of the Agent to the Bank of Madras at Erode in which they stated that all transactions entered into by one of the brothers or both, whether under the firm name or not, may be regarded as entered on behalf of the firm. On 30th July, 1919 the plaintiff who is also a merchant of Erode executed Ex. F, a promissory note for Rs. 30,000 in favour of the firm. This was delivered to the Bank by the firm as an enclosure with Ex. C (in O. S. No. 9 of 1923 on the file of the Court of the Additional Subordinate Judge of Coimbatore) of the same date as collateral security for the firm's drawings from the Bank on Current Account. It is admitted by both sides that the firm did not pay to plaintiff Rs. 30,000 at the time of execution of Ex. F. The firm began to draw various amounts from the Bank and the Current Account of the Bank showing the drawings of the firm and payments by it in reduction of its indebtedness to the Bank is Ex. G. It shows that on the 30th July the firm drew Rs. 11,500 from the Bank by issuing a cheque in favour of plaintiff. Ex. I is the Ledger of the firm showing the account between the firm and the present plaintiff. It shows that Rs. 11,500 was lent by the firm to the plaintiff. Thus the amount drawn by the firm from the Bank on that date was shown in the documents as a debt of the firm to the Bank and secondly as a debt of the plaintiff to the firm and thus ultimately reached the plaintiff's hands. Other amounts were drawn by the firm from the Bank. Some portions of the amounts reached the plaintiff and appears in Ex. I as lent to the plaintiff. Other portions were utilised by the firm for their own purposes or for being lent to other customers of theirs. By 31st August, 1921, the total amount drawn by the firm from the Bank amounted to Rs. 30,000 and odd and the account closed. On the same date, the Bank endorsed the note to the 4th defendant who filed on 21st September, 1921 a suit to recover the amount. (O. S. No. 172 of 1921 of the Principal Sub-Court afterwards renumbered as O. S. No. 9 of 1923 of the Additional Sub-Court). By that time the 1st defendant's brother died and his widow and daughter were sued in his stead. The present plaintiff was

1st defendant and the present 1st defendant was 2nd defendant and the present 2nd and 3rd defendants were 3rd and 4th defendants in that suit. It may be added that the deceased Kadir Mohideen and the present plaintiff married sisters and the plaintiff's brother married the daughter of Kadir Mohideen (now 3rd defendant). The suit was decreed, the amount to be recovered in the first instance from the assets of the firm and after exhausting the assets from the present plaintiff. On appeal the decree was modified by the High Court into an unconditional decree against all the defendants in that suit, but the execution against the present plaintiff was postponed to 16th March, 1925 to enable him to file the present suit which was accordingly filed on 10th January, 1925.

The plaintiff's contention briefly is that so far as the Current Account between the firm and the Bank is concerned, the firm was the principal debtor and he himself was only a surety by the execution of the promissory note Ex. F which was endorsed to the Bank as collateral security, and that, though the Bank or its endorsee may obtain a joint and several decree against himself and the partners of the firm, he is entitled to equitable relief from being ruined by the execution of the decree-holder solely against himself acting in collusion with the principal debtor. The vakil for the 4th defendant frankly stated before us that his motive for executing the decree against the plaintiff solely is that the 1st defendant discarded plaintiff's daughter and that he (4th defendant) is anxious that his daughter should not be similarly discarded and that he runs such risk if he executes the decree against 1st defendant and that he is not colluding with the 1st defendant. This may not be actual collusion but is very nearly akin to it. It may be also stated here that so far as the account between the firm and the plaintiff (Ex. I) is concerned, another suit has been filed by the 1st defendant against the plaintiff (O. S. No. 124 of 1923). Ex. C is the plaint and Ex. V is the written statement in that suit. The defence of the plaintiff is that he discharged all the dues to 1st defendant. Thus, even if some of the amounts drawn from the Bank by the firm ultimately reached plaintiff's hands and it is admitted some amounts did so reach them, they were the subject of independent loan transactions between the firm and the plaintiff and the subject of a separate account and of a separate suit. The plaintiff therefore contends that if it is found that he is owing any amount to the 1st defendant, it can be lawfully decreed in that suit and there is

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no justification for the 1st defendant's attempt to throw the whole burden of the firm's debt to the Bank on him.

Mr. Varadachari who appeared for the 1st defendant contends that the real view to take of the transactions with the Bank is that the plaintiff and the firm were both principal debtors and the plaintiff is not entitled to any relief as surety. He concedes that if this suit is dismissed and if his other suit is decreed, it amounts to plaintiff being made to pay doubly for the same amount, that if this suit is dismissed, his other suit in so far as it covers all amounts drawn from the Bank ought to be dismissed and consequently if the suit by the plaintiff is decreed, his own suit ought to be decreed subject to any plea of discharge; but he contends that, of these two alternatives, the former is the more proper course to take, *i. e.*, that this plaintiff's suit ought to be dismissed and that his own suit in so far as it covers amounts drawn from the Bank and re-lent to the plaintiff ought to be dismissed and as to other amounts not so re-lent, the plaintiff, after payment to the decree-holder (4th defendant), will be entitled to his remedy against the 1st defendant as a joint debtor for contribution even if such a round about way may end in plaintiff's ruin. Thus it is clear from the contentions of the respondent's vakil, the 1st defendant's description of the present suit in paragraph 4 of his written statement as a counter-blast to the other suit is not accurate.

The main point to be determined resolves itself into the question—what is the legal relation of the parties as between themselves in respect of the drawings from the Bank? Were they joint debtors or was the plaintiff a surety for the firm? In one sense all sureties are only joint debtors so far as the creditor is concerned. But in a special sense, a surety is only a surety and not a joint debtor though the creditor is entitled to a joint and several decree or even can exclusively sue the surety. In either case, if the amount is exclusively recovered by the creditor from the surety or one of the debtors who has not received its benefit at the time of the borrowing, it can be recovered from the principal debtor or the joint debtor respectively. But the exact form of the transaction is important. If the plaintiff is a surety, he can be indemnified in an appropriate case, before actual payment, by an anticipatory action of this kind [vide *In re Richardson : Ex parte The Governors of St. Thomas's Hospital*(1) cf. *Wolmerhausen* v *Gullick*(2)

1. (1911) 2 K B 705 at 715-6. 2. (1893) 2 Ch 514 at 518-9.

Mohideen Batcha Sahib v. Sheik Dawood Sahib. — Ramesam, J.

—a case of suing a co-surety, and *Veerappa Chetty* v. *Arunachalam Chetty* (3)—a case of partners].

When we examine Ex. G, we find that a considerable part of the amount drawn from the Bank reached the plaintiff's hands and, relying on this fact, the Subordinate Judge held that the account was opened substantially for his benefit and dismissed the suit. It is true that considerable amounts out of the drawings by the firm reached the plaintiff's hands. But it is necessary to remember two points (1) other portions were utilised by the firm itself, (2) the drawings appeared first in the account of the firm with the Bank and such portions of them as were lent to the plaintiff appeared in another account between the firm and the plaintiff. That the drawings were regarded in the first instance as the firm's drawings is clear from several considerations. For example, the net value of the amounts drawn from the Bank that reached the plaintiff after giving credit to payments never exceeded Rs. 18,000 and at the close of the account amounted only to Rs. 3,050. If, on the other hand, we look at the account between the firm and the plaintiff which covered not only sums re-lent to the plaintiff out of the drawings from the Bank but several other transactions, the indebtedness of the plaintiff was sometimes much less than Rs. 30,000, at other times it far exceeded it. It is clear that the sole object of Ex. F was to serve as collateral security for the Bank and did not represent a voucher for money borrowed. Ex. G and Ex. I must be regarded as the two separate and distinct accounts which they purport to be. It is true we have to look at the substance of a transaction and not the form. But where the form itself is part of the substance, we must attach weight to the form also. Mr. Varadachari relied on S. 37 of the Negotiable Instruments Act. But on the facts relating to Ex. F the section has no application. It is conceded that the plaintiff is entitled to an equitable relief if the facts justify it (*see* Buckley, L. J.'s remarks in the case already cited). The only question is one of fact and we agree with the learned Advocate-General's contention for the plaintiff. The Subordinate Judge seems to have been led away by certain false statements which the plaintiff made in the pleadings and depositions in the other case on matters which have really no bearing on the material point before us in his anxiety to save himself from the joint pressure of the 1st defendant and 4th defendant. It is true the Subordi-

3. (1924) 47 M L J 168 at 173-4 (P C).

Mohideen Batcha Sahib v. Sheik Dawood Sahib.

Ramesam, J.

nate Judge has observed the witnesses and we have not, as he seems to be anxious to point out. But the point before us is not one of choosing between the oral evidence but what is the real meaning of Exs. G, I, F with such light as is thrown on them by the oral evidence, if necessary. It is true, as Mr. Varadachari contends, that the real effect of the transactions of 1919 should be ascertained from the documents of the time and not from the later conduct of the parties, such as the filing of the connected suit O. S. No. 124 of 1923 by the 1st defendant. Our conclusion is based on the documents of 1919 only and the plaint in O. S. No. 124 of 1923 only corroborates and supports it.

There will be a decree declaring that the plaintiff is only a surety for the firm of Allauddin and Sons represented by defendants 1 to 3 and that defendants 1 to 3 are bound to indemnify the plaintiff in respect of the decree in O. S. No. 9 of 1923 and defendants 1 to 3 are liable in the first instance to satisfy the 4th defendant's decree as per the terms of the Sub-Court's decree in O. S. No. 9 of 1923.

In the event of non-satisfaction of 4th defendant's decree by defendants 1 to 3 to the extent of the amount as decreed by the Sub-Court in O. S. No. 9 of 1923 within three weeks, plaintiff will have liberty to apply in execution to raise the amount due under the said decree by appointment of a Receiver or otherwise from the assets of the firm and have the same paid to the 4th defendant in satisfaction of the said decree.

If the said decree is executed against the plaintiff in whole or in part the plaintiff shall have liberty to apply to the Court to have paid to him out of the funds raised under the last paragraph the amounts realised by the decree-holder from the plaintiff by such execution.

Plaintiff's prayer (2) in paragraph 18 will be dismissed and the appeal is dismissed as against 4th defendant. Plaintiff will have proportionate costs throughout on the footing that the relief in respect of which he succeeds is worth Rs. 35,000 and will pay proportionate costs in respect of the first three amounts in Sch. II (the costs will include the costs of private printing). Plaintiff will pay half the costs to 4th defendant and the 1st defendant will pay the other half of the costs of 4th defendant throughout.

A. S. V. *Decree modified.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE PHILLIPS AND MR. JUSTICE MADHAVAN NAIR.

C. Venugopalachariar ... *Appellant** (*Petitioner*)

v.

K. Chinnulal Sowcar and others... *Respondents* (*Respondents 1 to 5 and 7 to 10*).

Venugopalachariar *v.* Chinnulal Sowcar.

Provincial Insolvency Act (V of 1920), S. 43 (1)—Order of annulment under—Setting aside of, under O. 9, Civil Procedure Code—Court's power of—Remedy of insolvent in such a case—S. 10 (2) of Insolvency Act—Fresh application for adjudication under—Provincial Insolvency Act, S. 5—Effect—S. 43—Mandatory or directory.

S. 43 of the Provincial Insolvency Act is clearly mandatory.

When an order of annulment has been passed under S. 43 (1) of the Provincial Insolvency Act, it is not open to the Insolvency Court to set aside its order by virtue of the provisions of O. 9, Civil Procedure Code. S. 10 (2) of the Insolvency Act itself provides a special procedure by means of which the insolvent can have his remedy. According to that section he can, after obtaining leave of the Court, file a fresh application for adjudicating him an insolvent on the same facts. He cannot therefore rely on the provisions of the Civil Procedure Code by virtue of S. 5 of the Insolvency Act.

Arunagiri Mudaliar v. *Kandaswami*, 19 L W 418 followed.

C R P No. 554 of 1925 not followed.

Appeal against the order of the District Court of Chingleput, dated 1st April, 1925 in M. P. No. 129 of 1924 in O. P. No. 63 of 1923.

S. V. Venugopalachariar for appellant.

Respondents not represented.

The Court delivered the following

JUDGMENTS :—*Phillips, J.* :—The question for decision in this case is whether, when an order of annulment has been passed under S. 43 (1) of the Provincial Insolvency Act, it is open to the Isolvency Court to set aside its order by virtue of the provisions of O. 9 of the Code of Civil Procedure. The wording of the section is "If the debtor does not appear on the day fixed for hearing his application for discharge the order of adjudication shall be annulled..." This certainly seems to be a mandatory provision, but it is contended for the appellant that the word "shall" does not necessarily make the order mandatory and that it may be treated as merely directory. A similar question was considered in C. R. P. No. 554 of 1925, a case in which the debtor had not applied for discharge at all and on that ground his insolvency was annulled and it was there held that the Court had power to review its order of Phillips. J.

*A A O No. 201 of 1925. 10th February, 1926.

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Phillips, J.

annulment. It only differs slightly from the present case and cannot really be distinguished on principle. On the other hand, in a case in *Arunagiri Mudaliar* v. *Kandaswami Mudaliar* (1) Waller, J. was of opinion that S. 43 was absolutely peremptory in its terms and that therefore time could not be granted for applying for discharge. Krishnan, J. did not take this view, but he apparently held that if an order for annulment had been made the provisions of S. 10 (2) should be applied. I am inclined to agree that S. 10, cl. 2 governs this case. Under S. 5 of the Act the provisions of the Civil Procedure Code are to be applied subject to the provisions of the Act. S. 10 (2) provides a definite remedy for a debtor in respect of whom an order of adjudication has been annulled, and it gives him permission to present another petition on the same facts, provided that he satisfies the Court that he was prevented from prosecuting his application by any reasonable cause. Such a remedy is certainly distinct from any remedy granted by the Civil Proeedure Code and appears to prescribe definitely the procedure to be adopted. If that is so, then I think that the words "subject to the provisions of this Act" in S. 5 must have their full force; when the Act prescribes a definite method by which the debtor can obtain his remedy it is not open to him to adopt other methods which would be open under the Civil Procedure Code. No provision similar to S. 43 was contained in the old Provincial Insolvency Act and it is obviously one of the provisions of the new Act that the debtor shall be obliged to apply for discharge if he wishes to retain the benefits of insolvency so as to put an end to the proceedings in insolvency. Provisions have been enacted in S. 43 (1) that if he does not apply for discharge his adjudication shall be annulled, but it allows him in certain cases a further remedy of presenting another petition in insolvency which is the method of giving relief to persons who have been prevented by *bona fide* causes from prosecuting their applications. In this view, with all respect, I am not prepared to accept the views expressed in C. R. P. No. 554 of 1925 but would rather adopt the opinion expressed in *Arunagiri Mudaliar* v. *Kandaswami Mudaliar* (1). Although the insolvent has a remedy prescribed by the Act, he has chosen to apply under O. 9. His petition was rightly dismissed.

The appeal is accordingly dismissed.

Madhavan Nair, J.

Madhavan Nair, J. :—I entirely agree. The question is whether by virtue of the provisions contained in S. 5 of the

1. (1925) 19 L W 418.

Venugopalachariar v. Chinnalal Sowcar.

Madhavan Nair, J.

Provincial Insolvency Act the appellant is entitled to ask the Court to consider his application to restore and re-hear the petition for discharge dismissed on account of his default under S. 43. In my opinion, S. 43 is clearly mandatory; S. 5 states that subject to the provisions of the Insolvency Act the Insolvency Court in regard to proceedings under the Act shall have the same powers and shall follow the same procedure as it has and follows in the exercise of original civil jurisdiction. But the Provincial Insolvency Act itself has provided in S. 10 (2) a special procedure by means of which the appellant can have his remedy. According to that section, after obtaining leave of the Court he can file an application for adjudicating him an insolvent. The intention of the legislature therefore seems to be that in this class of cases arising under S. 43, the special procedure referred to in S. 10 (2) should be followed and not the provisions of the Civil Procedure Code. It is therefore clear that the appellant cannot rely on the provisions of the Civil Procedure Code by virtue of S. 5 of the Insolvency Act.

As regards the authorities, it was decided in C. R. P. No. 554 of 1925 that it is open to apply for review in a case where the debtor failed to apply for discharge under S. 43 within the specified time; but the learned Judges do not make any reference to the provisions of S. 10 (2) of the Insolvency Act. Krishnan, J.'s view in *Arunagiri Mudaliar* v. *Kandaswami Mudaliar* (1) as regards S. 10 (2) supports our conclusion, though his decision sitting as a single Judge in C.R.P. No. 554 of 1925 is in favour of the appellant's contention. No reference is made in that judgment to S. 10 (2) of the Provincial Insolvency Act.

I agree with my learned brother that it is not open to the appellant to rely on the provisions of the Civil Procedure Code in this case. I would also dismiss the appeal.

A. S. V. *Appeal dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE KRISHNAN.

Raghava Aiyangar and another. . . *Appts.** *(Defts* 4 *and* 5)

v.

Irula Thevan and others . . . *Respts.* (*Plff. and defts.* 1 *to* 3).

Raghava Aiyangar v. Irula Thevan.

Civil Procedure Code, O. 41, R. 33—Mortgagee—Suit for possession by, against mortgagor and against persons denying title and possession of mortgagor

*S. A. No. 1569 of 1923. 25th March, 1926.

1. (1925) 19 L W 418.

Raghava Aiyangar v. Irula Thevan.

and mortgagee—Decree dismissing suit on basis of finding against title and possession of mortgagor and mortgagee—Dismissal of suit against mortgagor also—Omission of mortgagee to appeal—Appeal by mortgagor—Right of—Finding in appeal in favour of title and possession of mortgagor and mortgagee—Decree for possession to mortgagee—Power of Appellate Court to give—Civil Procedure Code, O. 41, R. 33.

The plaintiff claiming as mortgagee from certain Mahajanams of a village sued to recover possession of the suit properties from defendants 1 and 2. The Mahajanams were made party defendants for the express purpose of determining the rights of all parties concerned. Defendants 1 and 2 denied the right of the Mahajanams as well as that of the plaintiff. They pleaded that they had neither title nor possession within 12 years before the date of suit.

The District Munsif found the points raised in favour of defendants 1 and 2 and dismissed the suit with costs both against defendants 1 and 2 and against the Mahajanams.

The plaintiff did not appeal from the Munsif's decree, but two of the Mahajanams did, feeling themselves aggrieved by the finding of the Munsif that neither the mortgagors (Mahajanams) nor the mortgagee had any title or possession within 12 years of suit. On the appeal of the Mahajanams the Sub-Judge was apparently inclined to hold that both title and possession of the mortgagors within the last 12 years were established.

He thought that the omission of the plaintiff to appeal from the Munsif's decree was a bar to his giving a decree for possession against defendants 1 and 2, but, being of opinion that the plaintiff's conduct ought not to prejudice the rights of the Mahajanams, he made a declaration in his decree dismissing the appeal that the rights of the appellants before him amongst other Mahajanams in the properties in dispute were left undetermined.

Held, reversing the Sub-Judge, that his disposal of the appeal was not at all proper.

If the Sub-Judge was of opinion that the title of the mortgagors as well as their possession within 12 years was proved, he should have given a decree giving effect to those findings. Even if the mortgagors were not entitled to possession and they could not get a decree for possession, the Sub-Judge could, under O. 41, R. 33, Civil Procedure Code, have given a decree to the plaintiff, even though he had not appealed.

Held further, that the Mahajanams had a right of appeal against the decree of the Munsif, because, though that decree was formally in favour of the Mahajanams, the Munsif had given effect to his adverse findings that the mortgagors as well as the mortgagee had no title and no possession within 12 years by dismissing the plaintiff's suit, and so long as that dismissal remained, it would prejudice the rights of the Mahajanams.

Second Appeal against the decree of the Court of the Subordinate Judge of Sivaganga in Appeal Suit No. 95 of 1921 (A. S. No. 37 of 1921, District Court, Ramnad) preferred against the decree of the Court of the Principal District Munsif of Manamadura in O. S. No. 176 of 1918.

R. Srinivasa Aiyangar for appellants.

K. Rajah Aiyar and *V. Ramaswami Aiyar* for respondents.

The Court delivered the following

JUDGMENT :—This Second Appeal arises in a suit brought by the plaintiff claiming as mortgagee from certain Mahajanams of the village to recover possession of suit properties from defendants 1 and 2. The Mahajanams were made party defendants for the express purpose of determining the rights of all parties concerned. Defendants 1 and 2 denied the right of the Mahajanams as well as that of the plaintiff. They pleaded that they had neither title nor possession within 12 years before the date of suit.

The first Court found the points raised in favour of defendants 1 and 2 and dismissed the suit. Against that decree the plaintiff did not appeal. But two of the Mahajanams appealed. As a matter of fact the First Court had dismissed the suit against the Mahajanams also with costs. Nevertheless as the finding of the First Court that neither the mortgagors nor the mortgagees had any title or possession within the last 12 years was against the interest of the mortgagors, they appealed against that decree. In appeal the case has been disposed of in a curious manner by the Subordinate Judge. He discussed the evidence in the case and was apparently inclined to hold that both title and possession within the last 12 years of the mortgagors were established but he has come to no very definite and clear findings on these points. He goes on to say " But for the fact that the plaintiff whose suit was dismissed has not chosen to appeal against the decree there will be no difficulty in the appropriate decree to be passed herein. "

Apparently if the plaintiff had appealed he would have been given a decree for possession against defendants 1 and 2. But the Subordinate Judge says : " I am unwilling to set aside the decree of dismissal so far as the plaintiff is concerned without his taking exception to it, but at the same time such conduct of the plaintiff should not be allowed to prejudice the rights of the Mahajanams two of whom are the appellants. " He therefore proceeds to declare " that the rights of the appellants amongst other Mahajanams in the sites A. B, C, D are left undetermined " and dismisses the appeal. He makes the declaration so that by reason of the default of the plaintiff the rights of the appellant may not be prejudiced. I think that this is not a proper disposal of the appeal. The learned Judge should have come to definite findings on the points raised in the case and if he was of opinion that the title of the mortgagors as well as their possession within 12 years was

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proved he should have given a decree giving effect to those findings. It may be that as the mortgagors are not entitled to possession they could not get a decree for possession. But a decree for possession could have been given to the plaintiff, mortgagee under O. 41, R. 33, Civil Procedure Code, even though he had not appealed. It was contended that the rule above-mentioned could not be applied because the appeal of the mortgagors in the Lower Appellate Court was itself not a competent one as there was nothing in the decree passed by the First Court which was against them. It is however clear to my mind that though that suit was dismissed against them by the First Court that Court had given effect to its adverse findings that the mortgagors as well as the mortgagee had no title and no possession within 12 years by dismissing the plaintiff's suit. So long as that dismissal remained, it would prejudice the mortgagors. They had therefore a right of appeal against the First Court's decree.

The learned vakil for the respondent cited *The Secretary of State* v. *Swaminatha Goundan* (1) in his favour. But that case is different from the present case. There it was held as the headnote shows "the fact that in the judgment there is an adverse finding on a point not directly or substantially in issue between the parties will not give a party a right to contest such a finding where the decree is entirely in his favour and does not necessarily imply that finding. The finding would not act as *res judicata* as regards such a point."

In the present case though the decree was formally in favour of the mortgagors there were findings against their contentions on which the Court acted dismissing the plaintiff's suit. Those findings are on points directly and substantially in issue between the parties; in fact they were practically the only issues of importance in the case. In these circumstances the ruling in *The Secretary of State* v. *Swaminatha Goundan* (1) cannot be applied. I am inclined to think that the mortgagors were entitled to appeal. This view is in accordance with the view taken by Sir Kumaraswami Sastri, J. in *Venkateswaralu* v. *Lingayya* (2).

In the Lower Appellate Court no objection seems to have been taken by the 1st and 2nd defendants to the maintainability of the appeal on the ground that there was no decree against the appellants. The appeal I think was a competent one in the Lower Appellate Court and it should have been disposed

1. (1911) I L R 37 Mad. 25 : 21 M L J 947.
2. (1924) 20 L W 65.

of according to law. The decree of the Lower Appellate Court must therefore be set aside and the case remanded to it for a fresh disposal according to law. The costs will abide and follow the result. The Court-fee paid will be refunded to the appellant.

Raghava Aiyangar v. Inula Thevan.

A. S. V. *Decree set aside: Case remanded.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE ODGERS.

Abdul Khadar Sheriff Saheb ... *Appellant* (Deft.)*

v.

Lalu Bi ... *Respondent (Plaintiff).*

Abdul Khadar Sheriff Saheb v. Lalu Bi.

Provincial Small Cause Courts Act—Sch. II, Art. 38—Maintenance—Suit relating to—Deed of maintenance in favour of a lady executed by a person not in law bound to maintain her—Amount recoverable under—Suit for—If one relating to maintenance—Mahomedan lady—Maintenance deed in favour of, executed by third party—Duration of—Divorce of lady by husband—Deed if ceases to have effect by reason of—Construction of deed.

A brother-in-law, who was not in law bound to maintain his sister-in-law, executed a registered deed of maintenance in her favour. *Held,* that a suit brought on that deed by the sister-in-law against the brother-in-law for the recovery of a sum payable to her under that deed was not a suit relating to maintenance under Art 38 of Sch. 2 of the Provincial Small Cause Courts Act.

The plaintiff, a Mahomedan lady, had applied to a Magistrate for an order under S. 488, Criminal Procedure Code directing her husband to give her maintenance. She was then living apart from her husband. In settlement of the disputes between the parties, the defendant, the sister's husband of plaintiff's husband, executed a registered deed, described as one of maintenance, in favour of the plaintiff. The deed recited misunderstandings between the plaintiff and her husband and that she desired some maintenance allowance. By the deed the defendant agreed to provide it for the whole of her lifetime, i. e., Rs. 40 payable every year on the 30th of a named month. The deed proceeded: "During the whole of your lifetime I shall not mortgage, etc., this security lands in favour of, etc....... . you shall stay in the house of your father-in-law or at any other place and be receiving the maintenance allowance."

After the execution of the said deed, the plaintiff was divorced by her husband.

On a question arising as to whether the deed ceased to have effect by reason of the said divorce, *held,* that there was nothing in the circumstances of the case to justify the Court importing into the deed the condition that it was to have effect only during the continuance between the plaintiff and her husband of the relationship of wife and husband.

On the proper construction of the deed the plaintiff was entitled to the maintenance payable under it for her life.

Second Appeal against the decree of the District Court of Guntur in A. S. No. 140 of 1922 preferred against the

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*S A No. 1137 of 1923. 3rd March, 1926.

Abdul Khadar Sheriff Saheb v. Lalu Bi

decree of the Court of the District Munsif of Tenali in O. S. No. 182 of 1921.

Ch. Raghava Rao for appellant.

K. Ramamurthi and *K. Kameswara Rao* for respondent.

The Court delivered the following

JUDGMENT :—A preliminary objection has been taken in this case on which I have heard a long argument as to whether this is a suit relating to maintenance under Art. 38, Second Schedule, Provincial Small Cause Courts Act. I much regret that on a careful consideration of the case I must find against the preliminary objection. The suit is brought for a sum of Rs. 76 and is brought by a sister-in-law against a brother-in-law who is not in law bound to maintain her but who entered into an agreement evidenced by document Ex. C with her. About this document I can say nothing at present as I shall have to hear the argument on the merits, but it calls itself a deed of maintenance and the suit is apparently brought on what the plaintiff calls a registered maintenance deed. In this case I was *prima facie* impressed with the fact that a suit for maintenance would in the ordinary acceptance of the term be a suit by a wife or in exceptional cases a daughter against husband or father for maintenance. I should have thought *prima facie* the expression was inapplicable as between a brother-in-law and a sister-in-law and I was very much inclined to hold at first that this was a mere suit on the contract Ex. C between one stranger and another as far as any obligation in law is concerned *dehors* the document. Various cases have been quoted on either side of the line, but I think I must follow the case in *Munir-ud-din* v. *Samir-un-nissa Bibi* (1) which seems to show that it is not necessary in order to take the case out of the cognizance of the Small Cause Court that the person bound in law to maintain should be one of the parties. *Muhammad Hussain* v. *Nur Jahan* (2), another Allahabad case, is to the same effect. In *Munir-ud-din* v. *Samir-un-nissa Bibi* (1) the cases quoted by the learned vakil for the respondent from the Allahabad Weekly Notes are distinguished and I think the main point of distinction is that the maintenance-holder was not a party in either of them. The same remark applies to *Annasami Sastrial* v. *Ramaswami Sastrial* (3). The decision in *Mohideen Vava Ravuthan* v. *Moosa Naina Ravuthan* (4) went on the consideration (that the maintenance holder, if the

1. (1917) I L R 40 A 52.
2. (1912) 16 I C 13.
3. (1913) I L R 38 M 553.
4. (1896) 6 M L J 137.

expression can be allowed in this case, was himself a co-sharer with the defendant, and therefore not entitled in law to call upon the latter to provide maintenance).

To come to the merits this appeal which is all about Rs.76 has taken all day in this Court. Plaintiff was the wife of Syed Ismail Saib and his sister's husband is the defendant. It appears that Syed Ismail Saib and his wife did not live happily together. She accused him of beating her and driving her from his house, robbing her of her jewels and purchasing one acre of land which is charged with her maintenance under Ex. C which is the document in dispute in this case. It appears that the lady had applied to a Magistrate for an order under S. 488 of the Criminal Procedure Code for maintenance. She was then living apart from her husband and in settlement of the disputes between the parties, Ex. C was entered into. It should be mentioned that since the execution of Ex.C in August, 1918 Syed Ismail Saib has divorced his wife and the allegation for the defendant is that the deed has ceased to have effect for this reason. Mr. Raghava Rao for the appellant relies on three circumstances with regard to Ex. C. The deed is described as one of maintenance as I have already pointed out in the judgment on the preliminary objection. It recites misunderstandings between the brother-in-law, *i. e.*, husband and the lady, that she desired some maintenance allowance, he agreed to provide it for the whole 'of your lifetime', *i. e.*,Rs.40 payable every year on the 30th of Bahula of Pushya month. It proceeds:

> "During the whole of your lifetime I shall not mortgage, etc., this security lands in favour of, etc............You shall stay in the house of your father-in-law Syed Lathief Saib or at any other place and be receiving the maintenance allowance."

It has been argued and it is conceded that the Magistrate's order should not be executed after a divorce has taken place. It is contended that that principle should be applied to this document, Ex. C. Three facts are relied on as showing that Ex. C must have been intended to operate only during such time as Lalu Bi continued to be the wife of Syed Ismail Saib. First,she is described as Lalu Bi,"the wife of Syed Ismail Saib," which was a perfectly true description at the time Ex. C was executed and one fails to see in what other way the lady could have then been identified. In my opinion, no force whatever can be given to the argument based on that description.

The second point is the Mahomedan Law, which is clear, namely, that after divorce a wife is not entitled to maintenance.

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Thirdly, the magisterial proceedings to which I have referred. It is clear that if you are to get away from the plain terms of the contract you have to read into it something which is not there and in order to entitle you to read into it something that is not there you must in my opinion fall within the decisions based on *Taylor* v. *Caldwell* (5) of which *Krell* v. *Henry* (6) is an example, that is to say, there must be a state of things, which appears from the evidence, from the circumstances, from the extrinsic surroundings to have been assumed by the parties to have been the foundation or basis of the contract, so that if that basis fails the contract becomes unenforceable. You have in the words of Vaughan Williams, L. J. to ascertain from the surrounding circumstances recognised by both the contracting parties what is the substance of the contract and then to ask the question whether the substantial contract needs for its foundation the assumption of the existence of particular state of things. Why should we assume in this contract that it was only to last so long as the woman remained the wife of another man? What evidence is there that it was the intention of both parties to the contract, for nothing less will do, that that was the basis on which the contract was made when the contract contains words diametrically opposed to any such construction? Twice in the contract appear words 'for the whole of your life-time'. It may be as the learned Subordinate Judge points out that the lady waived valuable rights of a much greater value than she has obtained under this contract. If that is the case, it seems unreasonable that, having entered into this contract with her husband's friend and relation, the husband should have had it in his power five minutes afterwards to divorce her and thus nullify the terms of the contract. I agree with both the Lower Courts and see no reason whatever for implying as the basis of this contract which both the parties must have contemplated the condition that this lady was to remain the wife of Syed Ismail Saib or rather that the contract was only to have effect during the continuance of that relationship. For these reasons, I am of opinion that the second appeal must be dismissed with costs.

A.S.V. *Appeal dismissed.*

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5. (1863) 3 B & S 826.

6. (1903) 2 K B 740.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE DEVADOSS AND MR. JUSTICE WALLER.

Narayana Chettiar and another. . .*Appellants** (*Defts. Nos.* 5 *and* 7 *and Counter-petitioners* 5 & 7).

v.

P. C. Muthu Chettiar and others. . . *Respondents* (2*nd Plaintiff-petitioner and defts.* 8, 9 *and* 10 *counter-petitioners* 8 *to* 10).

Narayanan Chettiar v. Muthu Chettiar.

Civil Procedure Code, O. 9—Inapplicability to execution proceedings—O. 47, *R.* 4, *cl.* (2) (*a*)—*Review—Application for—Notice to opposite party—Necessity—Order made without notice—Irregular or illegal—Execution application—Dismissal for default—Application for restoration—Notice to opposite party—Necessity—Order of restoration without notice—Validity—Finality—Review—Grounds—Pleader's absence if one—Execution Application—Dismissal for failure to furnish information necessary for proceeding with execution—Dismissal under O.* 21, *R.* 57 *or for default of appearance—Civil Procedure Code, S.* 151—*Execution application dismissed for default—Restoration under inherent power—Validity.*

Order 9, Civil Procedure Code, does not apply to execution proceedings, and a Court has no power to restore to file an application which was dismissed for default.

Notice to the opposite party is imperative under cl. (2) (*a*) of R. 4 of O. 47, Civil Procedure Code. An order made without such notice is an illegal and not merely an irregular order and the party affected is not bound by such order.

An application for execution was, owing to the absence of the decree-holder's pleader, dismissed. It was afterwards restored to file without notice to the opposite party.

Held, that the order restoring the application to file could not be considered to be a final order and the opposite party on coming to know of the order could urge any objection which it was open to him to urge if he had notice of the petition for restoration.

Held further, that the order restoring the application without notice to the opposite party was illegal.

The absence of a pleader is not a ground for review.

Where a decree-holder was asked to furnish certain information to the Court to enable it to proceed with the execution, and, on his failure to furnish the information or produce the necessary papers for proceeding with the execution, his application was dismissed, *held* that the decree-holder brought himself within O. 21, R. 57, Civil Procedure Code and that the dismissal of the application could not be considered to be a dismissal for default of appearance.

The fact that a fresh application for execution will be barred by limitation is not a ground for invoking the inherent power of the Court under S. 151, Civil Procedure Code, to restore an application dismissed for default.

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*A A A O No. 63 of 1924. 5th March, 1926.

Narayanan Chettiar v. Muthu Chettiar.

Appeal against the order of the District Court of Ramnad at Madura, dated 10th September, 1923 in Appeal Suit No. 153 of 1922 preferred against the order of the Court of the Subordinate Judge of Ramnad at Madura, dated 14th March, 1922 in E. A. No. 396 of 1921 in E. P. No. 36 of 1920 in O. S. No. 14 of 1908.

C. S. Venkatachariar for appellants.

M. Patanjali Sastri, and *C. S. Rama Rao Sahib* for respondents.

The Court delivered the following

JUDGMENT:—The 1st respondent herein filed an application on 23rd February, 1920 for the execution of the decree in O. S. No. 14 of 1908. The application after several adjournments came on for hearing on 11th October, 1921 when, owing to the absence of the decree-holder's pleader, it was dismissed. The decree-holder's pleader appeared before the Court some time after and the Court restored the application to file without notice to the opposite party. On the same day, the application was made by the decree-holder for an amendment of the execution application. When the amendment application came on for hearing the judgment-debtors contended that the order restoring the petition to file was illegal and that the amendment petition should not be allowed. The Subordinate Judge of Ramnad held that O. 9, R. 9, Civil Procedure Code, was not applicable to execution proceedings and that the order restoring the petition to file, if treated as an order under O. 47 was illegal as the other party was not given notice of the application. In the result, he dismissed the petition for execution as well as the application for amendment. On appeal the District Judge held relying on *Janaki Nath Hore* v. *Prabhasini Dasee* (1) that the Court has power under O. 47 to restore an application dismissed for default of appearance of the applicant and that even if it was not an order under O. 47, it should be treated as one made under S. 151. He set aside the order of the Subordinate Judge and remanded the execution application for disposal according to law. Defendants 5 and 7 have preferred this appeal against the order of the District Judge.

The first contention raised by Mr. C. S. Venkatachariar for the appellants is that the Court had no power to restore an application to file which was dismissed for default as O. 9, Civil Procedure Code, did not apply to execution proceedings.

1. (1915) I L R 43 C 178.

We have recently held in a case reported in *Kaliakkal* v. *Palani Goundan* (2) that O. 9, Civil Procedure Code, did not apply to execution proceedings. Mr. Patanjali Sastri who appears for the 1st respondent does not challenge the correctness of this decision and concedes that O. 9 is not applicable to execution proceedings. The order of the Subordinate Judge was not, therefore, one passed under O. 9, R. 9.

It is next contended that the order restoring the execution petition to file should not be treated as an order made in review of the order dismissing the application. The Subordinate Judge, when he restored the execution application to file, did not issue notice to the other side. Under O. 47, R. 4 notice to the other side is imperative. Cl. 2 (*a*) is as follows:

"No such application shall be granted without previous notice to the opposite party to enable him to appear and be heard in support of the decree or order, a review of which is applied for "

The question is whether an order passed without notice is a nullity or only an irregular order which the Court had jurisdiction to pass. The District Judge has relied upon *Janaki Nath Hore* v. *Prabhasini Dasee* (1) as supporting his view that the order of the Subordinate Judge was an order under O. 47. In that case it was held "where an appeal was summarily dismissed by a Division Bench of this Court and such order was ultimately set aside on review by the said Bench on an *ex parte* application without notice to the respondents, that the last order was valid even in the absence of such notice." The learned Judges held that the respondent was not 'the opposite party' within the meaning of R. 4, cl. (2) (*a*), interested to appear and support the order of dismissal when the only order sought to be substituted therefor was that the appeal be heard in his presence. With very great respect we are unable to follow the reasoning of the learned Judges. When an appeal is dismissed the decree of the Lower Court is left undisturbed and the respondent is entitled to the benefit of such dismissal, and when the dismissal is sought to be set aside it is he that is interested in supporting the order of dismissal. They conceded that an order of review can be made without previous notice to the person interested in supporting the order sought to be reviewed, but their view was that there was no opposite party when the Court was moved to set aside the order of dismissal for default. This case was

1. (1915) I L R 43 C 178.
2. (1925) 50 M L J 200.

Narayanan Chettiar v. Muthu Chettiar.

followed by another Bench of the Calcutta High Court in *The Official Trustee of Bengal* v. *Benode Behari Ghose Mal* (3). In that case though the learned Judges observe that they prefer to follow *Janaki Nath Hore* v. *Prabhasini Dasee* (1) in preference to a previous decision in *Abdul Hakim Chowdhury* v. *Hem Chandra Das* (4), they rest their decision upon the practice obtaining in the Calcutta High Court for forty years under which an appeal summarily dismissed under O. 41, R. 11, is set aside on review by the same Bench. These two cases cannot be authority for the position that no notice is necessary in the case of a review of an order under O. 47, for the practice of the Calcutta High Court was rightly or wrongly to set aside a summary order of dismissal on an application made for that purpose. In *Abdul Hakim Chowdhury* v. *Hem Chandra Das* (4) it was held that non-compliance with R. 4 of O. 47 rendered the granting of an *ex parte* application for review a nullity. Holmwood, J. observes at page 439 :—

> "It is clear that non-compliance with R. 4 of Order 47 renders the granting of this application for review, which was prejudicial to the respondent, a nullity and that such an application could not be granted without previous notice."

This judgment was concurred in by Chapman, J.

Where the law requires that a certain formality should be complied with before an order could be made, it is not open to the Court to ignore the clear provision of the law and pass an order without complying with it. The notice to the opposite party is imperative under R. 4, cl. (2) (*a*). It is urged by the respondent that when the Subordinate Judge restored the petition to file, the appellants should have preferred an appeal against that order and when a remedy is open to a party against an irregular order made by a Court it should not be considered to be a nullity; for the Court has power to review its own order and if it reviews it irregularly the party affected by the order should appeal against it and R. 7 (*b*) provides for an appeal if the Court granting the review contravenes the provisions of R. 4. The question is not whether the party to an illegal order has a remedy or not. If a Court does something which it is not authorised by law to do, that order has no legal force. Such an order is illegal and not merely an irregular one and a party is not bound by the illegal order. In *Surajpal Pandey* v. *Utim*

1. (1915) I L R 43 C 178.
3. (1924) I L R 51 C 943. 4. (1914) I L R 42 C 433.

Pandey (5) the learned Chief Justice and Coutts, J., declined to follow the case in *Janaki Nath Hore* v *Prabhasini Dasee* (1) and held that "where an appeal has been dismissed for default it cannot be restored under O. 41, R. 19, which has no application to such a case; nor can it be restored under O. 47, R. 4, cl. (2) without notice to the opposite party," and "if the appeal is restored without such notice and disposed of without the opposite party becoming aware of the order of dismissal or restoration; that party is entitled, as soon as the matter is drawn to its notice even in Second Appeal, to a hearing."

The order of the Subordinate Judge restoring the appeal to file cannot be considered to be a final order and the opposite party on coming to know of the order could urge any objection which it was open to him to urge if he had notice of the petitioner for restoration. This was clearly laid down by the Privy Council in *Krishnaswami Panikondar* v. *Ramaswami Chettiar* (6). In that case Sankaran Nair, J. without notice to the respondent excused the delay in filing the appeal and admitted it. When it came on for hearing after notice an objection was taken before the Division Bench which heard it as being out of time. The Division Bench after an examination of the affidavits filed on both sides dismissed the appeal as provided by S. 4 of the Limitation Act. It was contended before the Privy Council that the order of Sankaran Nair, J. was final and that the Division Bench had no jurisdiction at the hearing of the appeal to reconsider the question whether the delay was excusable. Their Lordships observe at p. 416:

"This order of admission was made not only in the absence of Ramaswami Chettiar, the contesting respondent, but without notice to him. And yet in terms it purported to deprive him of a valuable right, for it put in peril the finality of the decision in his favour so that to preclude him from questioning its propriety would amount to a denial of justice. It must, therefore, in common fairness be regarded as a tacit term of an order like the present that though unqualified in expression it would be open to reconsideration at the instance of the party prejudicially affected; and this view is sanctioned by the practice of the Courts in India."

The order of the Subordinate Judge therefore restoring the petition could not be considered to be a final order and is open to the objection of the other side. On any ground it was open to it if notice had been issued.

There are at least two stages in a review application. When a review application is filed, the Court gives notice to the opposite party and on hearing the opposite party if it con-

1. (1915) I L R 43 C 178.
5. (1921) 63 I C 99.
6. (1917) I L R 41 M 412: 34 M L J 63 (P C).

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siders there are grounds for re-opening the case it grants the application and if after review it sees reason to alter the order already passed, it modifies it. Against the order granting review there is an appeal under R. 7 of O. 47 and against the final order passed after review there is also an appeal. Why should a party be deprived of the right of appeal by his not being given notice when the Court grants an application for review? The Lahore High Court in *Firm Gopal Mal Ganda Mal* v. *Hara Chand* (7) holds the view that an order granting an application for review of an order dismissing a suit for default is not illegal merely because notice of the application was not given to the opposite party. If that party has been given every opportunity to raise any objections that he could raise and was therefore in no way prejudiced by the non-issue of notice to him." Though the party against whom an order is made without notice is entitled to object to it afterwards, it is not competent to a Court to omit to give notice to the opposite party when the law requires that notice shall be given of an application before it is granted.

The order made by the Subordinate Judge restoring the execution application to file cannot be considered on the merits as an order under O. 47, Civil Procedure Code. Though the petition mentioned O. 47, R. 1, S. 151 and O. 9, R. 9, yet the affidavit did not set out any grounds which would justify a review of the order. The absence of a pleader is not a ground for review. The grounds for review are set out in O. 47, R. 1 and the Privy Council has ruled that no Court is justified in reviewing an order made by it for any ground other than those mentioned in O. 47 or grounds which are similar to the grounds specifically mentioned therein. In *Chhajju Ram* v. *Neki* (8) a Bench of the Lahore High Court reviewed an order made by another Bench. Viscount Haldane in delivering the judgment of their Lordships observed:

> "They think that R. 1 of O. 47 must be read as in itself definitive of the limits within which review is to-day permitted, and the reference to practice under former and different statutes is misleading. So construing it they interpret the words 'any other sufficient reason' as meaning a reason sufficient on grounds at least analogous to those specified immediately and previously."

The order of the Subordinate Judge restoring the appeal to file cannot be treated as an order under O. 47, R. 1.

It is next contended for the respondent that the Court has power under S. 151 to correct its own errors or to pass an order

7. (1923) 75 I C 656.
8. (1922) I L R 3 Lah 127· 43 M L J 332 (P C).

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which it thinks proper in the interests of justice. In *Bholu* v. *Ram Lal* (9) it was held that "in the exercise of its inherent power expressly recognised by S. 151 of the Code, a Court can restore an application for execution after it has dismissed it for default and should do so notwithstanding that the applicant has an alternative remedy by making a second application for execution if he satisfies the Court that it should exercise its inherent jurisdiction *ex debito justitiae*." In that case reliance was placed upon *Debi Baksh Singh* v *Habib Shah* (10) as supporting the view taken by it. In *Debi Baksh Singh* v. *Habib Shah* (10) the plaintiff was dead and the Court not being aware of his death dismissed the suit for the non-appearance of the plaintiff. The Privy Council held that the dismissal was an abuse of the process of the Court. Their Lordships observe at p. 337:

> "Quite apart from S. 151, any Court might have rightly considered itself to possess an inherent power to rectify the mistake which had been inadvertently made."

Where the Court passes an order inadvertently or without being aware of certain facts which should have been brought to its notice it has power to correct an error committed by it, not owing to the negligence of a party, but owing to its not being aware of certain facts. What applied to a person who makes default in appearing before the Court cannot apply to a deceased person for he cannot appear before the Court and a Court has no power to dismiss a suit for default when the plaintiff is dead, and if it does without being aware of the fact, it can correct the wrong order made by it.

In this case it cannot be said that the application was dismissed for default of appearance. The decree-holder was asked to furnish certain information to the Court to enable it to proceed with the execution. He having failed to furnish the information or produce the necessary papers for proceeding with the execution, has brought himself within O. 21, R. 57 and the dismissal of the application cannot therefore be considered to be a dismissal for default of appearance. It is strongly urged by Mr. Patanjali Sastri that the respondent would lose the benefit of his decree for any subsequent application would be barred by the twelve years' rule and therefore the Court should use its inherent power to restore the application to remedy the wrong. The decree-holder can always file a fresh application for execution if the previous one is dismissed and the fact that a fresh application would be barred

9. (1921) I L R 2 L 66.

10. (1913) I L R 35 A 331: 25 M L J 148 (P C).

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by limitation would not give jurisdiction to the Court which it does not otherwise possess. With very great respect we are unable to agree with the learned Judge who decided *Bholu v. Ram Lal* (9) that the inherent power of the Court should be invoked in cases in which the second application may be barred by limitation. In *Babui Ritu Kuer* v. *Alakhdeo Narain Singh* (11) it was held that the Court should not use its inherent power for the purpose of restoring execution cases. Suhrawardy, J. in *Suradingu Muckerjee* v. *Giresh Chandra Tewari* (12) takes the view that "if an execution case is erroneously dismissed for default and the decree-holder applies for the restoration of the case by way of review, the application for restoration was one under S. 151 of the Civil Procedure Code, and the mere fact that it was also described as an application for review did not give the judgment-debtor a right of appeal against the order of restoration." The Bombay High Court in *Sonubai* v. *Shivaji Rao* (13) held that "where an application is made to re-admit an appeal dismissed for default, it was open to the Court to exercise its inherent powers to deal with the application under S. 151 of the Civil Procedure Code and make an order to the effect for the ends of justice or to prevent abuse of the Court, without any reference to the period of limitation fixed for application to re-admit appeals or to restore any other proceeding dismissed for default." When an application is granted under S. 151 of the Civil Procedure Code, the party affected by the order has no right of appeal as observed by Suhrawardy, J. in *Suradingu Muckerjee* v. *Giresh Chandra Tewari* (12), should the Court use such powers in such a way as to give an unfair advantage to one party over the other because it thinks that the ends of justice do require it. Justice should be administered according to law and procedure. It may be that in administering the law the Court may feel that one party gains an unfair advantage over the other. But it is not open to a Court to ignore the procedure laid down for its guidance and grant reliefs when it thinks such a relief should be granted without following the procedure laid down for its conduct. If the provisions of S. 151 is given the extended interpretation which some Courts are prepared to give them, the Courts may overlook the rest of the Procedure Code whenever it considers that the ends of justice do require that a certain order should be passed. Section 151 enables a Court to make such orders

9. (1921) I L R 2 L 66.
11. (1918) 4 Pat L J 530.
12. (1924) 78 I C 816.
13. (1920) I L R 45 B 648.

as may be necessary for the ends of justice and to prevent the abuse of the process of the Court. The Law of Limitation works hardship upon persons who have legitimate claims against their opponents, but the legislature has enacted the Law of Limitation; and it would not be right for the Court to overlook the Law of Limitation on the ground that the claim is a *bona fide* one and the defence on the ground of limitation is immoral. When the law lays down certain procedure for parties who are affected by any order, the mere fact that the Law of Limitation steps in and prevents the party from claiming relief under the procedure is not sufficient justification for the Court to grant a relief under S. 151. In this connection reference may be made to *Neelaveni* v. *Narayana Reddi* (14). There Oldfield, J. observed at page 101 "that our Courts possess inherent power is recognised in S. 151 of the Civil Procedure Code. But the exercise of the power in a particular form in which it is invoked must be justified in each case in the manner authorised by authority........and generally the legitimacy of its exercise must be tested with reference to the principles which authority has prescribed." In that case it was held "that a Court has no power, apart from the provision of O. 9, R. 13 of the Civil Procedure Code, to set aside an *ex parte* decree passed by itself." Though a Court may feel that an *ex parte* decree was improperly passed, it cannot set it aside by invoking its power under S. 151. The application to set aside an *ex parte* decree can only be granted if the conditions laid down in O. 9, R. 13 are satisfied. In *Somayya* v. *Subbamma* (15) it was held that if the Court sees sufficient reason to grant the application it could do so, but that decision was overruled by the decision in *Neelaveni* v. *Narayana Reddi* (14). We hold that the order restoring the execution application to file cannot be said to be an order passed under S. 151. The 1st respondent could have presented a fresh application for execution, but owing to the Law of Limitation he is precluded from doing so and that would not give jurisdiction to a Court to invoke the aid of S. 151. Mr. Patanjali Sastri very strongly urged that his client would lose about Rs. 5,000. However dishonest the conduct of the appellants might have been, they are entitled to the relief which the law gives them. We therefore with much regret allow the appeal but in the circumstances disallow the costs of the appeal.

A. S. V. *Appeal allowed.*

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14 (1919) I L R 43 M 94: 37 M L J 599 (F B).
15. (1903) I L R 26 M 599

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE WALLACE AND MR. JUSTICE MADHAVAN NAIR.

Ponnammai Ammal ... *Appellant** (*5th respondent*)

v.

The District Official Receiver, Tinnevelly, and another ... *Respondents* (*Petitioner and 1st respondent*).

Ponnammal Ammal *v.* The District Official Receiver, Tinnevelly.

Provincial Insolvency Act of 1920, *S.* 53—*Transferee of insolvent—Transfer from—Official Receiver's right to attack.*

Under S. 53 of the Provincial Insolvency Act of 1920 the Official Receiver is not at liberty to attack a transfer from a transferee of the insolvent.

Appeal against the order of the District Court of Tinnevelly, dated 17th October, 1922, in O. P. No. 85 of 1920.

P. N. Marthandam Pillai and *T. A. Ananta Aiyar* for appellant.

Respondents not represented.

The Court delivered the following

JUDGMENT :—The Official Receiver is not represented. A. A. O. No. 178, the document attacked in this case, is Ex. IX. The only evidence for the Official Receiver regarding it is P. W. 2, whose evidence strikes us as much inferior to that of P. W. 5, who is in no way related to the insolvent. The latter swears that money was paid on the mortgage. There is no evidence that about the date of mortgage Palavesa Kone was in insolvent circumstances and anxious to screen his property from pressing creditors. We consider that there is no ground for holding that Ex. IX is a transfer in fraud of creditors. Ex. IX ripened into a decree and that decree was transferred by Ex. VIII to 4th respondent. There is no finding by the Judge that Ex. VIII was not for value or in good faith. On the merits we see no reason why Exs. VIII and IX should be declared void as against the Official Receiver.

A. A. O. No. 179 *of* 1923 :—The judgments on the merits in this case follows the above. If Ex. IX is a genuine mortgage then the consideration for Ex. I is wholly genuine, as the learned Judge has found that the balance of the consideration apart from Ex. IX was actually paid. Ex. I must therefore also stand good.

A. A. O. No. 129 *of* 1923 :—The transfer from the insolvent in this case is Ex. X. Though no doubt there was a sale by him to his son-in-law the only evidence in this case is

*A A O Nos. 129, 178 and 179 of 1923. 27th October, 1925.

that the sale amount was paid; here also there is no evidence that at the time of Ex. X the insolvent was in such circumstances that he would be anxious to secrete his property from his creditors. We consider the evidence adequate to uphold Ex. X. That being upheld, the Official Receiver cannot attack Ex. XI, the transfer by the vendee under Ex. X to 5th respondent. These documents, therefore, must also stand.

A legal point as to the scope of S. 53, Provincial Insolvency Act of 1920, has been taken before us, viz., that under it the Official Receiver is not at liberty to attack a transfer from a transferee of the insolvent. The language of the section favours this view since it is the "transferor" who is the insolvent. This view is supported by a ruling reported in *Sudha v. Nanak Chand Daulat Ram* (1) and the ruling of Oldfield, J. in A. A. O. No. 159 of 1918 reported in *Jagannadha Aiyangar v. Narayana Aiyangar* (2). We are inclined to agree with the remarks of the latter on this point in that judgment including the ground on which he distinguishes the English cases cited by him but may point out that in both the cases *In re Vansittart: Ex parte Brown* (3) the transfer was upheld and not set aside as Oldfield, J. states. A more recent case *In re Hart: Ex parte Green* (4) has been cited to us, which carries on the principle laid down in the II Q. B. cases and applies it even to a case where the transfer from the original donee from the insolvent was subsequent to the act of bankruptcy. We need not however pursue the matter further here.

We allow the appeals and set aside the Lower Court's order *in toto* and dismiss the Official Receiver's petitions with costs throughout in all the three cases.

A. S. V. *Appeals allowed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE SPENCER AND MR. JUSTICE RAMESAM.

Chinna Munuswami Nayudu ... *Plaintiff* (Appellant)*

v.

Sagalaguna Nayudu and another ... *Defendants (Respts).*

Chinna Munuswami Nayudu v. Sagalaguna Nayudu.

Specific Relief Act, Ss. 21 (b) and 23 (b)—Sale of land—Agreement to reconvey if a certain price is paid—Time fixed—Death of vendor—Assignment

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*Appeal No. 431 of 1922. 5th March, 1925.

1. (1925) 7 Lah L J 160.
2. (1919) 52 I C 761.
3. (1893) 2 Q B 377 at 381.
4. (1912) 3 K B 6.

Chinna Munuswami Nayudu v. Sagalaguna Nayudu.

of right by heir to plaintiff—Specific performance—If can be claimed—Agreement, —Nature and validity of.

A person to whom some lands were sold executed on the day on which the sale deed in his favour had been executed, a deed of agreement the material terms of which were as follows.—"As I have this day purchased absolutely for Rs 10,000 the village of *S* which belongs to you, I shall again convey to you the said village after a period of 30 years from this date, *i. e.*, in the *Ani* cultivation season of the 30th year in case you wish to have the village again, and on your paying the said sum of Rs 10,000 to me." The vendor died and his heir assigned the rights under the agreement to *X* who tendered the amount due to the vendee at the time agreed upon. As the amount was not accepted and the lands re-conveyed, *X* sued the vendee for specific performance of the agreement. *Held,* (1) the agreement was a contract containing an undertaking on the part of the purchaser to accept an offer of re-purchase if made within a certain time, or, in other words, what the plaintiff obtained was the right under an executory contract to exercise an option at a certain fixed date to obtain a conveyance of immoveable property at a certain price; (2) there was no personal element in the agreement which made it incapable of being specifically enforced under S. 21 (*b*) of the Specific Relief Act; (3) the sale deed and the agreement formed part of a single transaction and the latter was supported by consideration; (4) the option not being personal was assignable, and the agreement was not void as offending the rule against perpetuities, and hence the plaintiff was entitled to specific performance of the agreement.

Quaere:—If the sale deed and the agreement really constituted a mortgage by conditional sale?

Appeal against the decree of the Subordinate Judge of Chingleput in O. S. No. 46 of 1920.

C. V. Anantakrishna Aiyar for appellant.

S. Varadachariar for respondents.

The Court delivered the following

Spencer, J.

JUDGMENTS :—*Spencer, J.* :—On 28th January, 1891, Venkatasubrahmanya Aiyar, on behalf of himself and his minor son Krishnaswami Aiyar, sold the village of Siyatti to Venkatapathi Nayudu for a consideration of Rs. 10,000. On the same day the parties executed what is termed a counterpart document, by which the purchaser Venkatapathi Nayudu agreed to reconvey the village for the same consideration of Rs. 10,000 if the vendor made an application for that purpose in the month of Ani 30 years later. Venkatasubrahmanya Aiyar died in 1899, leaving Krishnaswami Aiyar, his only son, surviving him. Krishnaswami Aiyar assigned his interest under the counterpart agreement, Ex. B (1), to the plaintiff in this suit for a consideration of Rs. 19,200 out of which Rs. 10,000 were to be paid to get a reconveyance according to the terms of that document.

The plaintiff's suit was dismissed in the Court of the Subordinate Judge of Chingleput on the ground that there was

no completed agreement, but only a standing offer, the benefit of which could not be assigned to a stranger. I am unable to agree with the learned Subordinate Judge upon this point. In my view Ex. B (1) was a contract containing an undertaking on the part of the purchaser to accept an offer of repurchase if made by the vendor for a certain amount at a certain future time. In other words what Krishnaswami Aiyar assigned to the plaintiff was the right under an executory contract to exercise an option at a certain future date to obtain a conveyance of immoveable property at a certain price. An offer or proposal cannot of course be enforced till it is accepted; but here the parties had gone beyond the stage of proposal and had entered into a contract which was supported by consideration, as was found in the trial Court. As the learned Subordinate Judge observed:

"Siyatti village was sold by Venkatasubrahmanya Aiyar for Rs. 10,000 *plus* the benefit of getting back the village under the conditions mentioned in Ex. B (1)."

The fact that Venkatasubrahmanya Aiyar had sold the village to Venkatapathi Nayudu was the consideration for executing this agreement for a reconveyance. The terms of the agreement between the parties were as follows:

"As I have this day purchased absolutely for Rs. 10,000 the entire village of Siyatti which belongs to you in the Conjeevaram Taluk, Chingleput District, and in which you hold ekabhoga mirasi right and the right to cultivate, I shall again convey to you the said village after a period of 30 years from this date, *i. e.*, in the Ani cultivation season of the 30th year in case you wish to have the village again, and on your paying the said sum of Rs 10,000 to me."

The translation does not exactly reproduce the Tamil. There is an emphasis on the word "you" where it occurs after the words "I shall convey to," but there is no condition to the effect that the purchaser would reconvey the village only to the vendor and no proviso that both of them should be alive on the date fixed for tendering Rs. 10,000 and writing a deed of reconveyance. In the normal expectation of human life in this Presidency it was improbable that both seller and purchaser should be alive 30 years after the date of contracting. The Subordinate Judge, who knows Tamil, was of opinion that the word தங்களுக்கே should not, in the contest where it occurs, be interpreted to mean that Venkatapathi Nayudu undertook to reconvey the property to Venkatasubramanya Aiyar personally and not to his heirs or assigns.

I agree with him. I think that there was no personal element in this transaction which would make the contract in-

Chinna Munuswami Nayudu v. Sagalaguna Nayudu. — Spencer, J.

capable of being specifically enforced under S. 21 (*b*) of the Specific Relief Act.

In this Court the main contest has raged over the question whether the Ex. B (1) was assignable before the sum of Rs. 10,000 was tendered. Under S. 23 (*b*) of the Specific Relief Act the representative in interest of a party to a contract may ordinarily obtain specific performance of it, provided that no personal quality of any party to the contract is a material ingredient. The Subordinate Judge has been led into some confusion of thought by a consideration of the case of *Helby* v. *Matthews* (1). He has also allowed himself to be led into a discussion of "option contracts," whatever they may be, and his judgment is vitiated by a reference to American authorities, a practice which has been condemned by the Privy Council. The case of *Helby* v. *Matthews* (1) was peculiar in that it dealt with what is known as a hire purchase contract. Brewster obtained on hire a piano and, after paying a certain number of monthly instalments, he pawned the piano with the respondents who refused to give it up to the owners (the plaintiffs). It was held by the House of Lords that there was no agreement between Brewster and the appellants that he should buy the piano. Before he paid the 36th and last instalment there should be no right by purchase in the hirer, and he was not bound to keep the piano till he had paid every one of the 36 monthly instalments; and as the owners could not compel him to buy, it was neither a purchase nor an agreement to buy within the words of S. 9 of the Factors Act of 1889, until the hirer completed the conditions necessary for a sale by making the last payment and exercising his option to purchase the piano. There is no complete analogy between that case and the present one.

The case of *Papa Naidu* v. *Muniswami Aiyar* (2), to the decision of which my learned brother was a party, has been cited before us, as it was held that what was agreed upon in that case constituted not a complete agreement but a mere standing offer. The purchaser of certain lands agreed to execute a reconveyance on payment of Rs. 800 within the 30th day of Vaikasi in any year whatsoever. It appears to me that that agreement was not enforceable, for the simple reason that there was no mutuality and no time fixed for performance. Apparently the promisor in that case agreed to sell upon demand before a certain date in any year, but as there was no

1. (1895) A C 471. 2. (1922) I L R 46 M 30: 42 M L J 432.

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time limit and no consideration for keeping the offer open for an indefinite time, the promisor was entitled to withdraw at any time before the promisee applied for performance.

At the end of paragraph 14 of his judgment the Subordinate Judge has confounded the tender, which was to be made in future, with the proposal or offer which must form the basis of every completed agreement. The real offer and acceptance were made on the same date as the sale. The date upon which the purchaser agreed to accept a tender of Rs. 10,000 for the purpose of reconveying the village of Siyatti to the seller is quite certain, namely, the month of Ani in the 30th year after 1891, and there is no vagueness upon the point of time for performance. It is as if Venkatapathi had said to Venkatasubrahmanya Aiyar:

"In consideration of your having sold me the village of Siyatti this day for Rs. 8,000, I undertake if you come to me in the month of June, 30 years hence and tender me a similar amount of Rs. 8,000 I will accept it and will execute to you a re-conveyance of that property."

Upon Subrahmanya Aiyar's acceptance of this offer the contract was put in writing and the contract was then registered. Whether the suit document and the sale-deed executed on the same day should be treated as a mortgage by conditional sale or a sale with a simultaneous but independent agreement for reconveyance is not of material consequence, except upon the point of assignability. The plaintiff says he tendered Rs. 10,000 on 19th June, 1920, and upon the defendant hiding himself, he gave him a registered notice of his willingness to pay the amount, to which the defendant replied refusing to receive it. The Subordinate Judge has found that there was a valid tender as alleged in the plaint, and there is no question of limitation, as sometimes arises when it is doubtful whether a particular transaction is a mortgage or an independent agreement for reconveyance.

The decisions in *Venkateswara Aiyar* v. *Raman Nambudri* (3) and *Narasingerji Gyanagerji* v. *Panaganti Parthasaradhi* (4) support the appellant's contention that contracts of this nature are capable of assignment. The last-named decision has recently been reversed by the Privy Council [vide *Narasingerji Gyanagerji* v. *Parthasaradhi Rayanam Garu* (4)] but not on the question of the contract being assignable, as their Lordships found the transaction concerned to be of the nature of a mortgage rather than a sale, and there is no difficulty in treating a mortgage interest as being assignable.

3. (1916) 3 L W 435. 4. (1921) M W N 519.
5. (1924) I L R 47 M 729 : 47 M L J 809 (P C).

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Spencer, J.

The English cases of *Buckland* v. *Papillon* (6) and *Manchester Brewery Company* v. *Coombs* (7), which were quoted as good law by McCardie, J. in *County Hotel and Wine Company* v. *London and North Western Railway* (8) are authorities for the proposition that in England options to purchase as well as contracts to sell are capable of assignment.

If the suit contract was a mortgage, the mortgagor's interest was unquestionably transferable.

We have therefore allowed the question to be argued whether Ex. B-1 constituted a mortgage by conditional sale or an executory contract. A Bench of this Court has already expressed its opinion that this was a sale rather than a mortgage [*see* the judgment in S. A. No. 2180 of 1915 exhibited as Ex. I (*b*)] but this opinion was given prior to the Privy Council decision in *Narasingerji Gyanagerji* v. *Parthasaradhi Rayanam Garu* (5) which reversed the judgment of Wallis, C. J. and Oldfield, J. in *Narasingerji Gyanagerji* v. *Panaganti Parthasaradhi* (4), upon which the Subordinate Judge relied for excluding the evidence of surrounding circumstances and deciding that Ex. B-1 was not a mortgage. There is much to be said in favour of either view, but it is unnecessary to pronounce in favour of the view that we have here a transaction in the form of a mortgage by conditional sale.

Again the insolvency of Venkatasubrahmanya Aiyar did not affect the right of the plaintiff, seeing that the Official Assignee under an indenture of 22nd February, 1916, Ex. BB, conveyed the father's interest to Krishnaswami, the insolvent's son, and that Krishnaswami's widow under Exhibit BB released her right on 16th February, 1921 in favour of the plaintiff after both the father's interest and the son's interest had become combined in the son.

The appeal must, for the above reasons, be allowed with costs throughout and the suit must be remanded. A preliminary decree will be passed directing the defendants to execute a conveyance in proper form on stamp paper and to register the same within one week from the re-opening of the Lower Court after the summer vacation and providing that on their failure to do so the Court will execute a conveyance of the suit properties to the plaintiff on their behalf.

The Lower Court will take evidence as to the claim for mesne profits due from date of plaint and will pass a final

4. (1921) M W N 519. 5. (1924) I L R 47 M 729 : 47 M L J 809 (P C).
6. (1866) 1 Eq 477. 7. (1901) 2 Ch. 608.
8. (1918) 2 K B 251.

decree after ascertaining what is due to plaintiff on that account. The plaintiff gives up his claim for damages for cutting off trees and depreciation of buildings, etc., covered by the seventh issue. The defendant will be at liberty to draw out the purchase amount deposited in Court.

Ramesam. J.

Ramesam, J. :—This appeal arises out of a suit to compel the defendants to execute a conveyance to the plaintiff. The Subordinate Judge dismissed the suit and the plaintiff appeals.

One Venkatasubrahmanya Aiyar and his son Krishnaswami Aiyar sold the suit village to Venkatapathi Nayudu, the father of the defendants, by Ex. B (dated 27th January, 1891) for Rs. 10,000. On the same day Venkatapathi executed the counterpart, Ex. B-1, to his vendors agreeing to reconvey the village for the same amount in the Ani month of the thirtieth year from the date of the agreement, if they wish to have it. The month of Ani in the thirtieth year corresponds to 14th June to 14th July, 1920. Venkatasubrahmanya Aiyar became insolvent in 1897 and died in 1899. His properties vested in the Official Assignee of Madras. In 1910 his son Krishnaswami Aiyar executed Ex. E to the plaintiff conveying his rights in the suit village. Krishnaswami Aiyar also obtained a deed from the Official Assignee (Ex.BB-1, dated 22nd February, 1916) by which the latter conveyed all rights to the suit village vested in him by reason of the insolvency of Venkatasubrahmanya Aiyar. Krishnaswami Aiyar died in 1919 His widow executed Ex. BB-1 (dated 16th February, 1921) releasing her rights in favour of the plaintiff. The Subordinate Judge has found (and the finding has not been questioned before us) that the plaintiff tendered the amount of Rs.10,000 in the month of June, 1920. The present suit was filed on 12th July, 1920. The Subordinate Judge found on issue 2 (*b*) that the effect of Ex. B-1 was that there was a standing offer to Venkatasubrahmanya Aiyar which ceased to have operation after his death and dismissed the suit.

The plaintiff appeals.

The main points argued at great length before us relate to the effect of Ex. B-1. Exs. B and B-1 formed part of a single transaction and Ex. B-1 is certainly supported by consideration. The respondent contended that the right created under it in favour of Venkatasubrahmanya Aiyar and Krishnaswami Aiyar was purely personal and could not be assigned (Issue 2-*b*). He also contended that it was an option to accept or refuse in June, 1920 and could be assigned only after

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the offer was accepted by the tender of the amount and thus ripened into a contract to sell and buy. He argues that before 14th June, 1920 there was no agreement for sale and purchase and therefore there was nothing to assign; neither Subrahmanya Aiyar nor Krishnaswami Aiyar lived up to that date, and no one else can accept an offer made to them. In other words, the option which an offeree has to refuse or accept an offer made to him, even if it can be called a right, is not such a right as can be assigned, so as to enable the assignee to accept the offer. The two aspects of the questions are to a certain extent connected.

It is true that, in cases of sale and an agreement to resell and other similar cases such as a lease with covenant for sale or a hire with an agreement for purchase, the second part of the transaction, where the vendee has an option, does not amount to an agreement for sale and purchase [vide *Lord Ranelagh* v. *Melton* (9) which was a case of lease with an option to purchase; *Helby* v. *Matthews* (1), which was followed and applied by Ayling, J., and myself in *Papa Naidu* v. *Muniswami Aiyar* (2), where there was no time fixed for the exercise of the option]. In all these cases, such a pre-contract [see per Lord Watson in *Helby* v. *Matthews* (1) is, if not supported by consideration, a *nudum pactum,* but if it is supported by consideration (as in this case) it amounts to an undertaking on the part of the offerer not to withdraw the offer, *i. e.,* it is a contract, not a contract for sale and purchase, but one not to withdraw an offer. It is a contract precedent to the agreement for sale and purchase. If the time fixed for the exercise of the option is any time within a certain date, the option may be exercised at any time within that date and will mature into a contract to buy and sell. But if the option is to be exercised at a certain stated time, *i. e.,* after the expiration of a certain period [as in *Lord Ranelagh* v. *Melton* (9)], or between certain points of time as in this case, it would seem that the option cannot be irrevocably exercised earlier than the stated time. This seems to be the opinion of Kindersley,V.C., in *Lord Ranelagh* v. *Melton* (9). But the question of assignability of the right of the optionee did not arise in any of these cases. They do not throw any light on that question.

Prima facie, the rights of the parties to a contract are assignable—*Tolhurst* v. *Associated Portland Cement Manufacturers* (1900) (10); *Tolhurst* v. *Associated Portland Ce-*

1. (1895) A C 471. 2. (1922) I L R 46 M 30 : 42 M L J 432.
9. (1864) 2 Dr. and Sm. 278. 10. (1901) 2 K B 811.

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ment Manufacturers (1900) (11). The same principle is embodied in S. 23 (*b*) of the Specific Relief Act unless "the personal quality of such a party is a material ingredient in the contract." These words of the Indian Act seem to me exactly the same as the words used by Fry, L. J., in his Specific Performance; S. 225. See also *Tolhurst* v. *Associated Portland Cement Manufacturers* (1900) (12) where Lord Macnaghten uses the words "personal elements". But he proceeds to state in S. 229:

> "Where though the relation established by the contract may have in it nothing personal, some previous personal relation of favour or otherwise, between the contracting parties, has been a material motive to the contract, it can be enforced by that person only."

Mr. Varadachariar relies on this statement of Fry, L. J., and on the previous relation between the parties to attract its application. But I do not find anything in S. 23 (*b*) of the Specific Relief Act (which corresponds to S. 225 of Fry, L. J., only) justifying an extension of it, so as to cover a case to which S. 229 of Fry, L. J., could apply. The learned vakil referred to *Vithoba Madhav* v. *Madhav Damodar* (13), *Mohendra Nath Mookerjee* v. *Kali Proshad Johuri* (14) and *Toomey* v. *Rama Shai* (15) as examples of the application of this principle. There is no resemblance between this case and the cases *Toomey* v. *Rama Shai* (15) and *Mohendra Nath Mookerjee* v. *Kali Proshad Johuri* (14). Even the case *Vithoba Madhav* v. *Madhav Damodar* (13) is distinguishable. The term of 30 years, in my opinion, makes it clear that the option was not intended to be personal. The parties could not have been so certain of the life of Subrahmanya Aiyar and Krishnaswami Aiyar up to the end of this time and could only have meant that the option might be exercised by them or their heirs. I may observe that the translation of Ex. B at page 15 is not quite correct. The vernacular word "Thangalukkai" is a merely emphatic form of saying "you", and though, if it occurs by itself, it may be translated as "you only"; in this case it represents the vernacular idiom, the emphatic form being sometimes used when the word is repeated in the same sentence. There is no word for "only". Mr. Varadachari also contended that even if there is nothing personal in the contract still the offeree only can accept an offer. This proposition is true of mere offers. But, in this case, we have an offer which is irrevocable under a contract and only the offeree

11. (1902) 2 K B 660 at 668 12. (1903) A C 414 at 417.
13. (1918) I L R 42 B 344. 14. (1903) I L R 30 C 265.
15. (1890) I L R 17 C 115.

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has an option to accept or refuse. This does not stand in the same footing as a bare offer. To say that the rights of an offeree in a case of this kind do not descend to his heirs seems to me a repetition of the argument about personal element in another guise and the term of 30 years seems to afford an answer to this argument as well. Mr. Varadachari has conceded that the family of Subrahmanya Aiyar was the object of Venkatapathi Nayudu's bounty and the option may be exercised by the heirs, but argued that it is not assignable. But this seems to be a distinction without any principle to support it. If a right can be transmitted to heirs, it is equally assignable. I therefore think that the option can be assigned even before it matures into an agreement to sell and purchase. In England it was so held in *Buckland* v. *Papillon* (6). Romilly, M. R. held that it was an interest under an agreement and vested in the assigns in bankruptcy (at page 483). On appeal Lord Chelmsford, L.C.in *Buckland* v. *Papillon* (16) said at p.71:—

> "I see no reason why an option to take a lease should not be an interest in land."

and lower down

> "It cannot be contended successfully that a person who may call for a lease at his own will and pleasure may not be looked upon as entitled to an agreement for a lease."

Under S. 54 of the Transfer of Property Act an agreement to sell, by itself, cannot create an interest in land—much less can an option even if it is made irrevocable by reason of a contract. But I do not see why the interest under the contract is not assignable as a right *ex contractu* if not as a right *in rem*. The case in *Buckland* v. *Papillon* (6) was referred to with approval by Lord Lindley in *Tolhurst* v. *The Associated Portland Cement Manufacturers* (1900) (12) and in *County Hotel and Wine Co., Ltd.* v. *London and North-western Railway Co.* (8) by McCardie, J. [see also Fry on Specific Performance, S. 1105, Redman's Landlord and Tenant, p. 28, Leake on Contracts, p. 919 and *Manchester Brewery Co.* v. *Coombes* (7).] In this Court the assignability of an option was recognised in *Venkateswara Aiyar* v. *Raman Nambudri* (3) and *Narasingerji Gyanagerji* v. *Panaganti Parthasaradhi* (4) modified by the Privy Council on another ground in *Narasingerji* v. *Parthasaradhi Rayanam Garu* (5).

3. (1916) 3 L W 435. 4. (1921) M W N 519.
5. (1924) I L R 47 729 : 47 M L J 809 (P C) 6. (1866) 1 Eq 477
7. (1901) 2 Ch 608. 8. (1918) 2 K B 251 at 256.
12. (1903) A C 414 at 423 16. (1866) 2 Ch App. 67 at 71.

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The learned vakil for the respondent also contended that the option is void as offending the rule against perpetuities. If it created an interest in land, this contention is correct. But in India it cannot create an interest in land, whatever the rule in England may be. As a right *ex contractu* intended to be exercised at a stated time (ranging within one month) by the optionees or their representative and assigns, it does not tie up the land and cannot offend the rule against perpetuities [see *Charamudi* v. *Raghavulu* (17) followed in *Raja of Karvetnagar* v. *Velayuda Reddy* (18)].

The assignment to the plaintiff is therefore valid. The further question argued by the appellant's vakil that Exs. B and B-1, on their true construction, amount to a mortgage does not arise. The fact of a long term is in favour of the appellant [see *Swaminatha Aiyar* v. *Appaswami Aiyar* (19), *Madhab Charan Das* v. *Rajani Mohan Das* (20) and *Modhu Sudam Das* v. *Rhidoy Moni Baistabi* (21)]. The oral evidence as to the produce of the lands also seems to be in his favour, but there is no evidence as to the prices of grains in 1890. On the other hand Exs. II, III, III (*a*) and IV suggest that the lands are of poor quality and, on a former occasion, this High Court held that the documents do not amount to a mortgage [Ex. I (*b*)]. This judgment does not constitute *res judicata*. It is not necessary to pursue this point further.

In the result I agree with my learned brother that the appeal should be allowed and with the order proposed by him.

A. S. V. *Appeal allowed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—MR. JUSTICE PHILLIPS AND MR. JUSTICE MADHAVAN NAIR.

Sankunni Variar and another ... *Appellants* (Counter-petitioners 1 and 2)*

v.

Vasudevan Nambudripad and others ... *Respondents (Petitioner and Cr. Petitioners 3 and 4, 4th respondent is made a party respondent in this Court only)*.

Sankunni Variar v. Vasudevan Nambudripad.

Civil Procedure Code, S. 145—Applicability—Surety for production of attached property of judgment-debtor—Default to produce property as per se-

*A A O No. 382 of 1925. 10th March, 1926.

17. (1916) I L R 39 M 462: 28 M L J 471.
18. (1915) 18 M L T 83.
19. (1915) 27 I C 505.
20. (1921) 64 I C 585.
21. (1901) 6 C W N 192.

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curity bond—Liability of surety in case of—Mode of enforcing—Execution—Suit upon bond after getting assignment thereof by Judge—Remedy of decree-holder.

In a case in which the question was whether sureties, who had executed a bond undertaking to produce when called for property of a judgment-debtor which had been attached in execution, could, on default, be proceeded against in execution, or whether the only remedy open to the decree-holder was to get the bond assigned by the Judge and to sue upon it, *held,* that the security bond could be enforced by way of execution apart from the provisions of S. 145, Civil Procedure Code.

Raj Raghubar Singh v. *Jai Indra Bahadur Singh,* (1919) I L R 42 A 158: 38 M L J 302 (P C) is authority for the position that, although the case does not come within the terms of S. 145, Civil Procedure Code, the Court has the inherent power to enforce its bond without recourse to a suit.

The liability under S. 145 attaches only in the case of a person who is "surety" for the payment of any money under the order of the Court and not a surety liable to pay owing to default.

Appeal against the order dated 17th October, 1925, of the Court of the Subordinate Judge of South Malabar at Ottapalam in E. P. No. 297 of 1925 in O. S. No. 8 of 1924.

T. M. Krishnaswami Aiyar and *T. S. Anantaraman* for appellants.

C. V. Anantakrishna Aiyar, N. Rama Aiyar and *K. R. Narayana Aiyar* for respondents.

The Court delivered the following

Phillips, J.

JUDGMENTS:—*Phillips, J.* :—In this case some property consisting of machinery and other things belonging to the judgment-debtor was attached and was proclaimed for sale. The sale was adjourned, and the appellants and two others executed a surety bond undertaking to produce the property when called for. This was on the 3rd of July, 1924. The sale was posted for 21st November, 1924 and was adjourned to 19th December, 1924 and then to 16th January, 1925 and on each occasion it was adjourned because the decree-holder granted time on receipt of certain sums from the judgment-debtor. The sale was again adjourned to 16th March, 1925 and the sureties failed to produce the property and consequently the sale could not take place. The decree-holder then put in a petition E. P. No. 297 of 1925 to enforce the liability of the sureties by a warrant of arrest. The Subordinate Judge has found that the sureties have committed default and has ordered that if they do not produce the attached articles or their value as per the bond a warrant of arrest will issue. Two of the sureties now appeal against this order and state that although they did not produce the property it was available in the factory close to the Court-house, and that therefore they

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should not be deemed to have committed default. It is also alleged that in July, 1925, an interim Receiver was appointed to take charge of the judgment-debtor's properties, as he had been declared an insolvent, and that when the sureties applied to the Insolvency Court that Court refused to allow them to remove the property. This latter contention is beside the point, because on 16th March, 1925, when the property was not produced, no question of insolvency had arisen, and the sureties were not prevented from producing the property. It does not appear that they even informed the officer conducting the sale that the properties were available close at hand, and even if the pressing machines in the tile factory could not be easily moved the rest of the property was easily transportable. The sureties had therefore no excuse for the non-production and must be deemed to have committed default and forfeited their bond on 16th March, 1925.

The next question, which is the more important one, is whether the Subordinate Judge had power to proceed against the sureties in execution. The appellants rely on a case reported in *Rajah of Venkatagiri* v. *Sura Krishna Reddi* (1) in which it was held that the only remedy open to the decree-holder was to get the bond assigned by the Judge and to sue upon it. I have looked at the papers in this case and the facts are almost identical with the facts of the present case and if that case is to be followed this appeal must be allowed so far as execution is concerned. In another case *Kommareddi Subbareddi* v. *Kollipara Veerayya Tata* (2) Sadasiva Aiyar, J. held the view that the bond could not be enforced in execution, whereas Spencer, J., held the contrary view. The view of the latter Judge is also in accordance with the judgment of a single Judge of the Allahabad High Court reported in *Madha Prasad* v. *Pearey Lal* (3). The respondent, however, relied chiefly on a decision of the Privy Council reported in *Raj Raghubar Singh* v. *Jai Indra Bahadur Singh* (4). The facts in that case are not quite the same as those here, for under the surety bond there under consideration the sureties undertook no personal liability but offered immoveable property as security. It was held that S. 145 could have no application but nevertheless, their Lordships held that the security could be enforced by the Court making an order upon an application to which the sureties are parties. The reason given for this is as follows:

"It is suggested that they (viz., the sureties) are bound to the Court. But the Court is not a judicial person. It cannot be sued. It cannot take

1. (1920) 39 M L J 472. 2. (1918) 9 L W 476.
3. (1921) 62 I C 719. 4. (1919) I L R 42 A 158 : 38 M L J 302 (P C).

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Phillips, J.

property, and as it cannot take property, it cannot assign it. It remains, therefore, that here is an unquestioned liability, and there must be some mode of enforcing it."

They conclude by saying that it can be enforced by an order of Court to which the sureties are parties. This is certainly authority for the proposition that, although the case does not come within the terms of S. 145, the Court has the inherent power to enforce its bond without recourse to a suit.

In the present case, it is contended that S. 145 is applicable because the sureties had become liable under cl. (*c*) for the payment of any money under an order of the Court in any suit or in any proceeding consequent thereon. This contention must be negatived for the liability under S. 145 attaches only in the case of a person who is "surety" for the payment of any money under an order of the Court and not a surety liable to pay owing to default. In this case there was no order of the Court directing payment of any money by the judgment-debtor and consequently the sureties were not sureties for such payment. It is on this view of the question that the case of *Rajah of Venkatagiri* v. *Sura Krishna Reddi* (1) was decided, but that case was decided without any reference to the decision of the Privy Council referred to above, according to which it would appear that the Court has inherent power to enforce a security bond. It has always seemed to me anomalous that, when the Court has granted indulgence to the judgment-debtor upon terms, that Court should not be able to enforce those terms without recourse to a separate suit. If the security had not been furnished, the property would have remained in the custody of the Court and would have been available for sale at any moment. The sureties having undertaken to produce the property or in default to be liable for its value, they cannot evade that liability. It would be a very round-about proceeding to compel either the Court or the decree-holder, both of whom have been prejudiced by the conduct of the sureties, to proceed by way of a separate suit. In accordance, therefore, with the principle laid down in *Raj Raghubar Singh* v. *Jai Indra Bahadur Singh* (4) I would hold that the security bond can be enforced by way of execution apart from the provisions of S. 145. The Lower Court's order directing process to issue is therefore correct, but in view of the circumstances of the case the value of the property ordered to be produced in Court, viz., Rs. 11,061, appears to be excessive. The property is still available for

1. (1920) 39 M L J 472. 4. (1919) I L R 42 A 158 : 38 M L J 304 (P C).

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sale in the hands of the Receiver in order to discharge the judgment-debtor's debts and therefore the loss to the other creditors is practically nil. The decree-holder has, however, to suffer, because instead of realising the full amount of his decree at once he may be compelled to receive only a proportionate share of the assets of the judgment-debtor, who is now an insolvent. He has therefore been prejudiced to that extent and, consequently, the amount which should be produced by the sureties is the decree amount together with interest up to date of production.

The Lower Court's order will therefore be modified by ordering the sureties to produce the property or Rs. 3,007-2-8 together with interest at 6 per cent. from 16th April, 1925 to the date of production. Time one month from this date.

As the appellants have substantially failed on the main question, they must pay the 1st respondent's costs in this appeal.

Madhavan Nair, J.

Madhavan Nair, J. :—I agree and have nothing to add.

A. S. V. *Order modified.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE SPENCER AND MR. JUSTICE VENKATASUBBA RAO.

Ramalingam Chettiyar ... *Appellant* (Plaintiff)*

v.

Messrs. Gokuldas Madavji & Co. ... *Respondents (Defts.).*

Ramalingam Chettiyar v. Messrs. Gokuldas Madavji & Co.

Vendor and purchaser—Breach by buyer of contract to take delivery of goods—Damages to seller for—Measure of—Sale by seller of goods months after date of breach—Difference between contract price and price of such sale—Claim to—When allowed—Cartage of goods from place originally fixed for performance to another place—Seller's right to—Place of performance changed at instance of buyer and to suit his convenience—Effect—Interest on damages awarded to seller from date of plaint—Award of—Discretion of Court—Civil Procedure Code, S. 34—"Decree for payment of money"—Claim to unliquidated damages if included in.

In a suit by the seller against the buyer for damages for breach of a contract to take delivery of certain goods, the amount of the damages payable to the plaintiff is, when there is an available market for the goods; *prima facie* the difference between the contract price and the market price on the date of the breach.

Where the seller alleges that there was no available market for the goods for a period subsequent to the breach, that the goods were in consequence sold after the lapse of that period and that the buyer is therefore liable for the difference between the contract price and the price at which the goods were actually sold, the onus lies on the seller of making out that very special case

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*Appeal No. 550 of 1925. 12th November, 1925.

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Held further that, in such a suit, a suit; the seller was entitled to cartage upon the goods taken from the place originally fixed for delivery to another place, when it appeared that the place of performance was changed at the instance of the buyer and to suit his convenience.

Held also, that in such a suit the Court had a discretion under S. 34, Civil Procedure Code, to allow interest upon the damages awarded from the date of plaint.

The word "money" in S. 34, Civil Procedure Code; is not confined to an ascertained sum. The expression "decree for the payment of money" in the section must be construed as including a claim to unliquidated damages.

Appeal against the decree of the Court of the Additional Subordinate Judge of Ramnad at Madura in O. S. No. 27 of 1919.

C. V. Anantakrishna Aiyar and *C. V. Harihara Aiyar* for appellant.

N. Rama Aiyar for *P. N. Marthandam Pillai* for respondents.

The Court delivered the following

Spencer. J.

JUDGMENTS :—*Spencer, J.* :—This is a suit for damages upon a contract to sell 80 candies of cotton at Rs. 414 a candy entered into in June, 1918. The plaintiff appeals.

He tendered and the defendants took delivery of 36 and odd candies. They declined to take delivery of the remaining 43 and odd candies as the market was falling. The plaintiff re-sold the rejected goods and brought this suit for damages and got a decree. The learned Subordinate Judge gave the plaintiff a decree for damages based on the price prevailing at the end of December. The goods which the defendants would not receive were actually sold in March, 1919, the breach of contract having been on December 26, 1918. The Subordinate Judge took an earlier date, upon the principle that every party to a contract is bound to mitigate the damages as far as possible. The plaintiff got the goods sold through a broker who is P.W.4. He stated that the cotton season ends with 31st December and that there was no market for cotton for two or three months and so they were unable to sell the goods till Messrs. Harvey & Co. purchased them in March at Rs. 282 a candy. His statement that there was no market for cotton for two or three months is belied by the market report book, Ex. L, which has been filed as evidence on plaintiff's behalf. This shows sales of cotton at varying prices in December, 1918 and in January, February and March, 1919. On certain dates there is an entry that no business was done. The man who kept this book has not been examined as a witness and therefore it is impossible to accept the suggestion now

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Spencer, J.

put forward that the prices entered therein do not represent real sales of cotton offered for sale on the dates upon which the price is entered. The Subordinate Judge, therefore, acted reasonably in taking a date in December when the market price of cotton was Rs. 330 as being the price at a date nearer the date of breach than the date on which the goods were actually sold in March.

The next point which has been argued before us is that the plaintiff is entitled to cartage upon the goods taken from Virudupatti to Tuticorin for which he claimed Rs. 265-12-0 in his plaint. The defendants contented themselves with a statement that the plaintiff was not entitled to any cart-hire and that the amount claimed was excessive. The goods were taken to Tuticorin because the defendants closed their branch of business at Virudupatti. The plaintiff alleged that the defendants asked him to deliver the goods at Tuticorin when they ceased to keep their branch open at Virudupatti. It was evidently on the defendants' account that the goods were taken to Tuticorin and delivered there, and the defendants, as they changed their place of business, must bear the costs incurred by the plaintiff in doing an act necessary on defendants' account to be done for the performance of the contract. Although the plaintiff did not specifically include this claim for cartage among his grounds of appeal he appealed in respect of the whole amount claimed by him in the Lower Court which was disallowed. We must therefore allow his appeal in respect of the sum of Rs. 265-12-0, the details of which have not been questioned.

The Lower Court gave interest to the plaintiff from the date of plaint only upon the sum of Rs. 778-2-0 which related to a prior contract. Interest was not given upon the main sum of Rs. 3,690 and odd found to be due as damages and the plaintiff makes this a ground of appeal. In many cases decided by this Court interest has been given upon damages from the date of plaint, of which *Sheik Mahamad Ravuther* v. *The British India Steam Navigation Co., Ltd.* (1) and *Boddu Sanyasiraju* v. *Kotra Ramamurthi* (2) are instances. In *Pannalal* v. *Radha Kissen* (3) interest was similarly allowed by a Bench consisting of the Chief Justice and another Judge. In *Crewdson* v. *Ganesh Das Hari Bux* (4), Mookerjee, J. observed that he could see no difference between interest prior to suit and interest *pendente lite* when the claim is for an un-

1. (1908) I L R 32 M 95 : 18 M L J 497. 2. (1913) M W N 874.
3. (1922) 39 C L J 77. 4. (1920) 60 I C 288.

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liquidated amount of damages. In my opinion it is discretionary for the Court to allow interest upon damages from the date of plaint under S. 34 of the Code of Civil Procedure. I see no reason why a successful party should be made to suffer because his claim is not decided soon after the filing of his plaint. When he files his plaint he puts the matter in the hands of the Court for decision. If it be held that the plaintiff cannot get interest from the date of his filing his plaint, it is equivalent to saying that the plaintiff must be deprived of the fruits of his success to the extent of losing interest from day to day during the pendency of his suit on the sum that he was entitled to at the date of his going to Court. The date of instituting the suit is the date upon which the rights of parties are ordinarily determined, and when the decree fixes the amount of damages due, I think that they may be taken as fixed as on the date of the suit, and interest allowed upon that sum.

In this view plaintiff's appeal must be allowed to the extent of the claim for cartage and the interest from the date of suit at 6 per cent. The plaintiff will also get proportionate costs on the amount in respect of which his appeal has succeeded.

Venkatasubba Rao, J.

Venkatasubba Rao, J. :—I agree.

The first question to be decided is, what is the correct measure of damages? The contract was broken on the 25th December, 1918. The plaintiff sold the goods on the 24th March, 1919, and claims the difference between the contract price and the price realised at the sale. When there is an available market for the goods, the difference between the contract price and the market price on the date of the breach is the amount of the damages *prima facie* payable. Mr. Anantakrishna Aiyar, the learned vakil for the plaintiff, urges that his client postponed the sale as there was no market for cotton at Tuticorin for a period of three months subsequent to the breach. This is extremely unlikely and the evidence on the record shows that the contention is unfounded. The plaintiff must make out the very special case set up by him and he has failed to do so. The damages have been rightly fixed with reference to the date of the breach.

The second question that arises is, is the plaintiff entitled to interest on damages from the date of the suit to the date of the decree? The right to interest may fall under three heads: (1) Interest that accrued due prior to the institution of the suit; (2) Interest from the date of the suit to the

date of the decree ; (3) Interest from the date of the decree to the date of realisation.

No claim has been made to interest for the period previous to the institution of the suit. The right to such interest is governed by the general law and we are not at present concerned with any question relating to it.

The right to interest under the second and third heads must be determined with reference to S. 34 of the Civil Procedure Code. The plaintiff's right to interest from the date of the decree to the date of realisation is conceded and the point to be decided is therefore confined to the plaintiff's right to interest that has accrued during the pendency of the suit.

The material portion of S. 34 reads thus :—

"Where and in so far as a decree is for the payment of money, the Court may in the decree order interest at such rate as the Court deems reasonable to be paid on the principal sum adjudged *from the date of the suit to the date of the decree.*"

A decree for payment of damages is undoubtedly a decree "for the payment of money". It is however contended for the defendant that if at the time of the suit the damages were unliquidated, interest cannot be awarded under the section. No distinction is made in the section between an ascertained sum of money and unliquidated damages. As a question of construction, I find it difficult to accept the suggestion that the word "money" in the section should be understood in the limited sense of an ascertained sum. The expression "decree for the payment of money" is very general and to give it due effect, it must be construed as including a claim to unliquidated damages. The Court is not bound to give interest, for, it must be noted, that the section gives a discretion to give or refuse interest ; and whatever the nature of the claim is, whether it is a claim to a fixed sum of money or to unliquidated damages, the Court is bound in every case to exercise a sound discretion. The mere fact that the decree is for the payment of damages cannot by itself be a bar to the plaintiff being awarded interest. It is important to bear in mind that S. 34 contains the rule of law applicable and that reference to the Interest Act is irrelevant.

On this question there is not much authority. There are two cases of the Calcutta High Court in which two different views have been taken [*Crewdson* v. *Ganesh Das Hari Bux*(4) and *Pannalal* v. *Radha Kissen* (3)]. In the first case it was held that interest should not be awarded on damages from

3. (1922) 39 C L J 77. 4. (1920) 60 I C 288.

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the date of the suit to the date of the decree. Mookerjee, J. refers to cases where interest was refused from the date of the breach to the date of the suit and observes that there is no distinction in principle between a claim to interest for the period *previous* to the suit and for the period *subsequent* to the suit. With all respect I am unable to agree. The distinction is clear. The claim to interest prior to the suit must be determined with reference to the general law, whereas a claim to interest for the period during which a suit is pending is governed by a specific provision, S. 34 of the Code of Civil Procedure. Mookerjee, J. does not cite any authority in support of his view.

In *Pannalal* v. *Radha Kissen* (3) Sanderson, C. J. points out that on the Original Side of the Calcutta High Court it was usual to grant interest on unliquidated damages from the date of the suit to the date of the decree. That the Court has a discretion even in such a case under S. 34 was not disputed before the learned Chief Justice, who, however, observes that it is advisable to give reasons when interest is awarded on unliquidated damages. This is more in the nature of a rule for the guidance of Subordinate Courts, and it may probably be followed by them with advantage. The Code, however, does not say that reasons shall be given, and when they are not given, the High Court may examine the material before it with a view to find out if the Lower Court has exercised the discretion properly. In the present case the Lower Court has not awarded interest and its attention does not seem to have been called to the point. In my opinion, we shall be exercising our discretion soundly by awarding interest to the plaintiff. He filed his plaint within a few months of the breach and a few weeks of the sale.

In coming to Court, therefore, he did not make any delay. It has not been shown that he has protracted the trial of the suit. It stands to reason that the plaintiff's right must not be made to depend upon the mere accident of a speedy disposal or otherwise of a case. In a Court where there is a congestion of work, a plaintiff may obtain a decree only after the lapse of six years, in another Court in six months. Why should the plaintiff's right to get interest be made to depend upon circumstances over which he has no control ?

In regard to cartage claimed I agree that the plaintiff is entitled to it. The place of performance was changed to

3. (1922) 39 C L J 77.

suit the convenience of the defendants and he cannot be heard to say that cartage is not payable.

The result is, that the appeal succeeds to this extent, namely, that to the amount awarded by the Subordinate Judge, the amount of cartage will be added and the total sum will carry interest at 6 per cent. per annum from the date of the suit to the date of realisation.

I agree in the order proposed by my learned brother regarding costs.

A. S. V. *Decree modified.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE PHILLIPS AND MR. JUSTICE MADHAVAN NAIR.

Bathina Subbarami Reddi ... *Petitioner** (*Petitioner*)

v.

Ganesam Pattabhirama Reddi ... *Respondent* (*Respt.*).

The Guardians and Wards Act, S. 41 (3) and (4)—Minor attaining majority—Discharge of guardian—Filing accounts in Court—Power of Court to inquire into correctness of accounts—Remedy of minor.

Where a minor for whom a Court guardian had been appointed attained majority and the guardian was discharged after filing his accounts in Court, the Court has no jurisdiction to hold an enquiry and ascertain what amount is really due by the guardian. Under the scheme of the Guardians and Wards Act, the remedy of the ward is to proceed by way of suit. *Nabu Bepari* v. *Sheikh Mahomed* (1900) 5 C W N 207; *Jagannath Panja* v. *Mahesh Chandra Pal*, (1916) 21 C W N 688; *Abdul Hasim* v. *Maleka Khatun*, (1916) 29 C L J 44 followed; *Sita Ram* v. *Mt. Govindi*, (1921) I L R 46 All 458 and *Rama Rao* v. *Rangaswami Rao*, (1924) 92 I C 98 dissented from.

Petition under S. 115 of Act V of 1908 and S. 107 of the Government of India Act praying the High Court to revise the order of the District Court of Nellore dated 25th February, 1925 in I. A. No. 402 of 1924 in O. P. No. 85 of 1918.

B. Somayya for petitioner.

M. Patanjali Sastri for respondent.

The Court delivered the following

JUDGMENTS :—*Phillips, J.* :—This is a petition under the Guardians and Wards Act. The minor having attained majority, the guardian was discharged and filed his accounts in Court. The minor took objection to these accounts and wished the Court to hold an enquiry and ascertain what amount was really due by the guardian. The District Judge has declined to hold any enquiry and has referred the minor to a suit if so advised. It is now contended for the petitioner, the late

Phillips, J.

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*C R P No. 400 of 1925. 2nd March, 1926.

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Phillips, J.

minor, that this order is wrong and that under S. 41 (4) the Court ought to have held an enquiry and discharged the guardian after ascertaining what was due from him. There is no specific provision in the Act for such taking of accounts and determining the amount due by the guardian, but it is contended that in view of the fact that S. 41 (4) says, "the Court may declare him to be discharged from his liabilities," etc., this can only be done after an enquury has been held, but it must be observed that there is no mandate in this section and it is not necessary that the Court should make such a declaration. Undoubtedly, if it were incumbent on the Court to make such a declaration, the Court would not be able to do so without holding an enquiry. It has been held by the Calcutta High Court in three cases *Nabu Bepari* v. *Sheikh Mahomed* (1), *Jagannath Panja* v. *Mahesh Chandra Pal* (2) and *Abdul Hasim* v. *Maleka Khatun* (3), that under the Guardians and Wards Act no such enquiry should be held. The Allahabad High Court has taken a contrary view in *Sita Ram* v. *Musammat Govindi* (4) and there is also the opinion of a Judge of this Court in *Rama Rao* v. *Rengaswami Rao* (5) to the effect that the Court ought to take an account. To deal with this last case first, the learned Judge seems to have come to this conclusion on the ground that he was unable "to concede that the Court is bound to accept without scrutiny any accounts that the guardian chooses to submit." This will certainly be applicable if the Court were bound to make the declaration mentioned in S. 41 (4), but if the Court is not so bound, it does not seem necessary that there should be such an enquiry. If the Court is satisfied on a perusal of the accounts and on hearing the parties that the accounts are correct it may make such a declaration, but it is not bound to do so, nor is it bound to certify that the accounts are correct. The whole scheme of the Act seems to provide for matters of this kind, *i. e.,* disputes between the minor and the guardian, by way of suit. During the minority Ss. 35 and 36 provide for suits being filed by a next friend of the minor in case of misconduct on the part of the guardian, and there can be no doubt that, when the minor attains majority, he can bring a suit against his guardian. There being no provision at all for any enquiry into accounts by the Court I think the opinion expressed by the Calcutta High Court is the correct one. This view obtains

1. (1900) 5 C W N 207.
2. (1916) 21 C W N 688.
3. (1916) 29 C L J 44.
4. (1921) I L R 46 A 458.
5. (1924) 92 I C 98.

support from S. 34 (*c*) and (*d*) where it is provided that the guardian must exhibit his accounts in the Court at such times and in such form as the Court from time to time directs and that if so required by the Court the guardian must pay into Court the balance due from him on those accounts, or so much thereof as the Court directs. These provisions presume that the accounts are correctly submitted and the Court may take action on such accounts, but no provision is made for an enquiry as to whether the accounts are correct or not. Similarly, under S. 41 (3) when a guardian has been finally discharged, the Court may require him to deliver any property in his possession or control belonging to the ward or any accounts in his possession or control relating to any past or present property of the ward. This section quite clearly assumes that a guardian will put in the accounts that he has been directed to keep into Court and that these accounts will be accepted subject to the minor's rights, or those of a next friend on his behalf to question them in proper proceedings. If the Court were to hold an enquiry and come to the conclusion that the guardian owed a much larger amount than that stated in his accounts, there is no provision for enforcing any such order. Further, such order under Ss. 47 and 48 would be final; under S. 48 an order made under this Act shall be final and shall not be liable to be contested by suit or otherwise. If therefore the Court made an order that the guardian was to pay a definite sum into Court such an order could not be contested by a suit and there would be no remedy left either for the guardian or for his ward. This seems to be contrary to the intentions of the Act, which as I have said before appear to leave all these questions for decision by a suit outside the guardianship proceedings. The interests of the minor are sufficiently protected firstly by the selection of a guardian by the Court and secondly by the control of the Court over such guardian. With all respect I am unable to agree in the conclusion of the Allahabad High Court for I do not think the arguments are very convincing. I prefer to follow the opinion of the Calcutta High Court referred to above and hold that the Court should not hold an enquiry and pass orders in such matters.

The District Judge's order is therefore correct and this petition is dismissed with costs.

Madhavan Nair, J.

Madhavan Nair, J. :—I entirely agree. The conclusion which we have arrived at in this case is also supported by the reasoning in C.M.A. No. 269 of 1925 to which I was a party. In that case it was held that under S. 45 (1), cl. (*c*) a guardian

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is not expected to deliver 'property or accounts' which he has not actually got in his possession. In other words, it was held that the property to be delivered is the property which is actually in the possession of the guardian and not what he should have with him according to the opinion of the Court; and so also, the accounts to be delivered are those which have been actually kept by him and not those which according to the Court are the correct accounts. The phrase used in S. 41 (4) " when he has delivered the property or account" is the same as used in S. 45 (1) (*c*) and may be understood also in the same way.

T. S. V. *Petition dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE KRISHNAN.

S. M. A. Khuddus ... *Petitioner* (Defendant)*

v.

Sowdagar Mahammad Hussain ... *Respondent (Plaintiff)*.

Khuddus v. Mahammad Hussain.

Civil Procedure Code, O. 2, R. 2—Bar of suit—Suit for rent—Second suit for possession and future mesne profits—Suit for mesne profits for the period between the two suits—If barred.

The plaintiff brought a suit originally for rent or mesne profits for two months and odd, and obtained a decree therefor. He subsequently sued for possession and future mesne profits and that suit was also decreed He then claimed in a fresh suit mesne profits from the end of the period for which he had claimed mesne profits in the first suit up to the date of the second suit. *Held,* the suit was not barred under O. 2, R. 2. *Ponnammal* v *Ramamirda Aiyar,* I L R 38 M 829 applied.

Petition under S. 25 of Act IX of 1887 praying the High Court to revise the decree of the Court of the District Munsif of Bezwada, dated the 28th day of March, 1924 in S. C. S. No. 520 of 1923.

S. Swaminadhan for petitioner.

Krishna Arya and *Viraraghavulu* for respondent.

The Court delivered the following

JUDGMENT :—This is a revision petition which raises a somewhat curious point of law. The plaintiff had brought a suit originally for rent or mesne profits for two months and odd, and for that he got a decree. Subsequently, he brought a suit for the recovery of possession of the property and asked in that suit for future mesne profits and that suit also was decreed in his favour. In the present suit he claims mesne profits from the end of the period for which he had claimed mesne profits in the first suit up to the date of the second suit.

*C R P No. 798 of 1924 22nd March, 1926.

Khuddus v. Mahamumad Hussain.

A question is raised whether this present suit is not barred by reason of the second suit under O. 2, R. 2. There is no direct authority on the point. We have therefore to decide it on general principles.

In *Ponnammal* v. *Ramamirda Aiyar* (1) a Full Bench of this Court decided that where a person had brought a suit for possession of property, he could bring a second suit for past mesne profits in respect of the same property, the two causes of action being distinct. There is also a ruling in *Doraiswami* v. *Subramania* (2), that after a suit is brought for possession and future mesne profits, if the Court refuses future mesne profits, a second suit will lie for such future mesne profits, the reasons given being that the refusal of the Court in the first suit to give the mesne profits will not make the matter *res judicata*. No other authorities have been brought to my notice. On the authority of *Ponnammal* v. *Ramamirda Aiyar* (1) it would follow that the fact that the second suit here was brought for recovery of possession of the property would not make the third suit barred under O. 2, R. 2, for they expressly held that in such a case a suit for past profits would lie. The only question is, whether the fact that in the second suit here the plaintiff had asked for future profits would have the effect of barring the present suit. I am inclined to think that it would not have, for O. 2, R. 2 (1) only says that the plaintiff is bound to include in the same suit only such claims as he is entitled to make in respect of the cause of action. If there is difference in the causes of action between the first suit and the second suit, O. 2, R. 2 will not apply. The claim for future mesne profits was not a claim based upon any cause of action accrued to the plaintiff but upon the permission given under the Code to join a claim for future profits in suits for possession. It is entirely in the discretion of the Courts to grant or not to grant future profits. In the present suit we have a claim for past profits already accrued for which a cause of action had arisen. For the claim for future profits in the second suit there was no cause of action. It cannot be said therefore that there was a common cause of action for this suit and for the claim for future profits in the last suit. In this view O. 2, R. 2 cannot apply and the District Munsif's view is therefore right.

The revision petition fails and is dismissed with costs.

T. S. V. *Petition dismissed.*

1. (1914) I L R 38 M 829 : 28 M L J 127 (F B).
2. (1917) I L R 41 M 188 · 33 M L J 699.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE PHILLIPS AND MR. JUSTICE MADHAVAN NAIR.

Madhura Gramani ... *Appellant** (*3rd deft.*)

v.

Thummala Sesha Reddi and others... *Respondents* (*Plaintiffs and defendants* 1 *and* 2).

Madhura Gramani *v.* Thummala Sesha Reddi.

Civil Procedure Code, O. 9, *R.* 9—*Tenants-in-common—Suit for partition and separate enjoyment—Dismissal for default—Subsequent suit by assignee of rights—If barred.*

The plaintiff's assignor obtained a decree for joint possession with respect to a three-fourths share in a piece of property, and subsequently sued for partition and separate enjoyment of that share. The suit was dismissed under O. 9, R. 8, Civil Procedure Code. After the assignment in his favour, the plaintiff sued for partition. *Held,* the right to partition being a right accruing from time to time, a suit based on the plaintiff's assignor's right to partition was not barred by O. 9, R. 9.

There is no difference in the law in this respect between joint tenants and tenants-in-common.

Appeal against the order of the Court of the Subordinate Judge of Nellore in A. S. No. 11 of 1925 (A.S.No.225 of 1924, District Court, Nellore) preferred against the decree of the Court of the Principal District Munsif of Nellore in O. S. No. 851 of 1922.

V. C. Viraraghavachariar for appellant.

B. Somayya for respondents.

The Court delivered the following

JUDGMENT :—This is an appeal against an order of remand by the Subordinate Judge of Nellore. The District Munsif had held that the suit was barred under the provisions of O. 9, R. 9, and had dismissed it. The suit was one for the partition of certain property in which the plaintiff claimed a three-fourths share. In the year 1911 the plaintiff's assignor had brought a suit for obtaining joint possession of this three-fourths share and it had been decreed. In 1917 she filed for partition of her share and separate enjoyment and that suit was dismissed under O. 9, R. 8. It is now contended for the appellant that the present suit which is also one for partition is barred under O. 9, R. 9. The Subordinate Judge has relied on several cases of the Allahabad High Court and one in *Madan Mohan Mondul* v. *Baikanta Nath*(1) cases which dealt

*A A O No. 380 of 1925. 1st March, 1926.

1. (1906) 10 C W N 839.

with suits for partition in families which were originally joint Hindu families, and the contention now raised is that these decisions must be deemed to be solely applicable to the case of joint Hindu families and cannot be applied in the case of joint owners as tenants-in-common.

In the first place, it must be observed that in most of these cases, although the family was a joint Hindu family, it had become divided in status prior to the suit. On principle it is difficult to see how any distinction can be drawn between joint tenants and tenants-in-common for the right of partition belong equally to each of them. In the present case, when the suit of the plaintiff's assignee was dismissed in 1917 she was relegated to her right of possession as joint owner and consequently to her right to partition, a right which accrues from time to time, for this right had not been taken away by the prior litigation. It is not contended for the appellant that the question is *res judicata* and consequently the present suit which is based on the plaintiff's assignor's right of partition is not barred by O. 9, R. 9.

The appeal is dismissed.

T. S. V. *Appeal dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE DEVADOSS.

Singavarpu Rajaratnam and another... *Appellants** (*Respts.*)

v.

Sheik Hasanbi and another ... *Respondents* (*Petitioners*).

Rajaratnam v. Sheik Hasanbi.

Civil Procedure Code, S. 47 and O. 21, R. 102—Application for restitution of possession—Transferee from judgment-debtor pendente lite—*Decree-holders taking delivery—Items not ascertained—Effect of—Remedy.*

A transferee from a judgment-debtor *pendente lite* applied for restitution of possession of properties which had been taken delivery of by the decree-holders under an order of Court, on the ground that it had not been ascertained at the time of taking delivery which items fell to the share of the decree-holders. *Held,* it was competent for him to maintain such an application which is really one under S. 47, Civil Procedure Code, and was not barred by O. 21, R. 102.

Appeal against the order of the Court of the Additional Subordinate Judge of Bezwada dated 21st November, 1923 in A. S. No. 34 of 1923 (A. S. No. 20 of 1923) Sub-Court, Bezwada, preferred against the order of the Court of the District Munsif of Nuzwid at Bezwada in C. M. P. No. 83 of 1922 (in

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*A A A O No. 52 of 1924. 11th March, 1926.

Rajaratnam v Sheik Hasanbi

O. S. No. 126 of 1909, Additional District Munsif's Court, Bezwada).

P. Markandeyulu for appellants.

P. Satyanarayana Rao for respondents.

The Court delivered the following

JUDGMENT :—The first point raised in this appeal is that the petition for restitution of possession by the respondents is incompetent inasmuch as the application on the ground of dispossession is barred by O. 21, R. 102, Civil Procedure Code. That rule applies to cases where a person who gets title from the judgment-debtor is prevented from objecting to the delivery of possession to the judgment-creditor of the property directed to be delivered to him. In this case the respondents obtained a sale of the judgment-debtor's property on 23rd July, 1920 when an application for execution was pending and the property had been divided but lots had not been cast. The execution petition was dismissed on the ground that one of the decree-holders had attained majority and that the petition filed by the next friend was not sustainable. A subsequent application for execution was made but no lots were cast and the items that fell to the share of the decree-holders were not determined. Without determining the items that ought to go to the decree-holders delivery was ordered and certain items of property in the possession of the respondents was delivered to the decree-holders. They applied to the Court for restitution of possession on the ground that it was not ascertained at the time of delivery which items fell to the decree-holders' share. This contention was upheld by the District Munsif and he ordered restitution of the property. On appeal the Subordinate Judge of Bezwada upheld the order of the District Munsif

Mr. Markandeyulu's objection to the order is that it is not competent for the transferee of the judgment-debtor's right in the property to file such an application. It is conceded that the judgment-debtor himself could file an application if any item of property is wrongly delivered to the decree-holder. The complaint in this case is that before determining what item fell to the share of the decree-holder particular items of property in the possession of the respondents were delivered. Such a contention could have been put forward by the judgment-debtor, and it is difficult to see how the transferee from the judgment-debtor pending execution could not put forward the same contention. This application is not one under O. 21, R.99 or R. 101, but one under S. 47. Though wrongly Rr. 99 and 101 are mentioned in the petition we have to look at the

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substance of the petition and not merely at the heading. Mr. Markandeyulu relies upon *Kanakasabai Mudaliar* v. *Rajagopal Naidu* (1) and *Rev. V. C. L. Neilson* v. *Sadananda Swamiar* (2) in support of his contention. Those cases have no application to the present, for, there the application was made not on the ground that the property was wrongly delivered but on the ground that the property was not liable to be delivered as the applicants were in possession. Their possession was only the possession of the judgment-debtor and therefore they could not apply for restitution under R. 99 or R. 101. The application of the respondents therefore was not incompetent.

The next contention raised by Mr. Markandeyulu is that notice was served on the judgment-debtors and they did not object to the delivery of the property and therefore they cannot question the delivery after it has taken place. It does not appear that notice was issued to the respondents and the judgment-debtor that the items now in dispute were going to be delivered to the decree-holder. Even if such a notice was issued it would not be competent to the Court to deliver certain items of property without determining whether those items fell to the share of the decree-holder. In a case where a division of property has to be made and lots cast before the share of each decree-holder could be ascertained, it would not be proper to order delivery of particular items to the decree-holder. Therefore the service of notice in this case even if it did mention particular items would not be proper notice as required by law, and it would not prevent the respondents from getting the relief available to them under S. 47. In *Vallabha Valia Raja* v. *Manakata Kovilakath* (3) and *Jainulabdin Sahib* v. *Krishna Chettiar* (4) it was held that a judgment-debtor's remedy is under S. 47 when property was wrongly delivered or some item of property to which the decree-holder was not entitled was wrongly taken possession from the judgment-debtor.

In the result the appeal fails and is dismissed with costs.

T. S. V. *Appeal dismissed.*

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1. (1917) 42 I C 523.
2. (1910) 8 I C 805.
3. (1924) 86 I C 947.
4. (1921) 41 M L J 120.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE KRISHNAN AND MR. JUSTICE VENKATASUBBA RAO.

Sri Mahant Paramananda Das Goswami ... *Appellant** (*Plaintiff*)

v.

Radhakrishna Das and others ... *Respondents* (*Defendants*).

Sri Mahant Paramananda Das Goswami v. Radhakrishna Das.

Limitation Act, Arts. 124, 120—Hereditary office—Suit for possession of—Nomination of successor by head of a Mutt—Claim to succession based solely on—Applicability of Art. 124 to case of—Hereditary succession—Meaning—Right to office of Mahant barred—Right to recover immoveable properties of Mutt—Effect on.

The appeal arose out of a suit filed by the appellant for a declaration that he was the lawful Mahant of a Mutt and for recovery of properties belonging to it. The question for decision was whether the suit was barred by limitation, and that depended upon whether the suit was one for possession of a hereditary office governed by Art. 124 of the Limitation Act. If the claim could not be regarded as one to a hereditary office, Art. 120 of the Limitation Act admittedly applied to the case and the suit was admittedly barred.

The rule of succession to the deceased Mahant as stated in the plaint was one by nomination by him of his successor, from among his Chelas. The plaintiff clearly based his claim on being the person so nominated and on no other ground. There were, no doubt, allegations in the plaint to the effect that the plaintiff was the patta Chela or principal Chela and that he was a fit person to be the Mahant, but it appeared that they were made to show that his nomination was unexceptionable and that no claim to the Mahant's office was based on those allegations. And the matter was made quite clear by the form in which the plaintiff got the first issue framed which ran as follows :—

"Whether plaintiff was duly nominated as his successor by the late Mahant and if so whether plaintiff is therefore entitled to succeed to the office of Mahant."

That was the sole issue raised as to plaintiff's title.

Held, that the suit was not one for possession of a hereditary office within the meaning of Art. 124 and that it was barred by limitation.

Where succession is by nomination by the holder in office of his successor, it is not a hereditary succession. Hereditary succession is succession by the heir to the deceased, under the law, the office must be transmitted to the successor according to some definite rules of descent which by their own force designate the person to succeed. There need be no blood relationship between the deceased and his successor, but the right of the latter should not depend upon the choice of any individual. If the rule were that the senior living Chela of the Guru succeeds to his office on his death, that might be a case of hereditary succession, even if the Guru nominated him as his successor, when no rights flowed from such nomination. But where the right to succession is based solely on nomination, the succession cannot be treated as hereditary.

*Appeal No. 445 of 1922. 26th March, 1926.

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Per Krishnan, J.—If plaintiff is barred from claiming the office, his right to recover the immoveable properties of the Mutt is also barred, as those properties go with the Mahantship.

Appeal against the decree of the District Court of Ganjam in O. S. No. 31 of 1921.

A. V. Viswanatha Sastri for *C. Padmanabha Aiyangar* for appellant.

A. Krishnaswami Aiyar and *B. Jagannadha Doss* for respondents.

The Court delivered the following

Venkatasubba Rao, J.

JUDGMENTS :—*Venkatasubba Rao, J.* :—The plaintiff filed the suit which gives rise to this appeal, for a declaration that he was the lawful Mahant of the Ganga Mata Mutt and for recovery of properties belonging to it. The Mutt is situated at Puri but it owns properties of considerable value in the District of Ganjam. The District Judge who tried the suit dismissed it on the ground that the plaintiff's suit was barred by limitation. No question of fact was tried in the case and the learned Judge held that on the allegations in the plaint the claim was barred. We are not therefore concerned with the truth or falsity of the statements in the plaint but the only question is whether on these averments made in it the suit is in time or is barred. If the plaint can be construed as one for possession of a hereditary office the article applicable is Art. 124 of the Limitation Act, which prescribes a period of 12 years and the suit would not be barred. If, on the other hand, the claim cannot be regarded as one to a hereditary office, Art. 120 which prescribes a period of six years applies and the suit would then be barred. The point to be decided is, on the allegations in the plaint, is this a suit for possession of a hereditary office.

In paragraph 6 of the plaint the plaintiff refers to the fact that the late Mahant Sri Madhava Das nominated him as his successor and wrote in his own hand the Guru Pranali and the Sidha Pranali containing the plaintiff's name and handed the Pranalis to the plaintiff in token of his appointment as his successor. He further says that the appointment is irrevocable and was not revoked by the late Mahant.

In paragraphs 8 and 9, the plaintiff alleges that the 1st defendant puts himself forward as the successor to the late Mahant on the strength of a will executed by the latter, the genuineness of which the plaintiff does not admit. He adds that he denies that the 1st defendant was nominated by the previous Mahant as his successor,

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In para. 13 he says that the 1st defendant's nomination, even if true, is invalid by reason of his own previous nomination.

These are the principal paragraphs where the plaintiff's title to the office is set out and in these he very clearly bases his title upon nomination by the previous Mahant.

In paragraph 5 he says thus:—

"The petitioner (plaintiff) is the patta Chela which means the principal Chela and also a Chela chosen to succeed to the Mutt after the Mahant."

And again in paragraph 7 he says:—

"Moreover the petitioner (plaintiff) is the only Chela fit to become the successor left behind the late Mahant."

I do not think that the plaintiff puts forward in either of these two paragraphs any claim to a hereditary office. The statement that he is the principal Chela implies that there are other Chelas. Why he describes himself as "principal Chela" he does not explain. I do not think it can be said that the allegation means that he occupies a particular character, which, apart from and independent of nomination, clothes him with the right to succeed. It is not as if he has made an allegation that he is the seniormost Chela and as such entitled to succeed without the intervention of the previous Mahant. The reference in paragraph 7 to his being "the only Chela fit" again shows that he is not relying upon his filling any definite legal character which entitles him to succeed. The word 'fit' connotes that he is personally qualified from moral and such other standpoints of view.

Paragraph 15 of the plaint asks for the removal of the defendant and appointment of a suitable Mahant, which means of course not necessarily the plaintiff. In paragraph 16 he reiterates his claim that he is the only person entitled according to law and custom of the Mutt.

On a careful reading of the plaint, I find that the claim is put forward only on the ground of nomination or appointment by the previous Mahant. The appellant's learned vakil's contention is, that the plaint must be so construed as if there is an allegation that the plaintiff, by reason of a certain legal character that he possesses, is entitled to the succession of the Mutt. This contention seems to be unfounded and must be overruled. This is, however, a minor contention and I shall now proceed to deal with the principal argument advanced by him.

Mr. A. V. Viswanatha Sastri, the appellant's learned vakil, puts his case thus:

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"In the case of a Mutt, he contends, if the incumbent nominates and duly instals his successor the latter succeeds not by force of the nomination but by reason of the fact that the heir has been irrevocably fixed who succeeds under the law of inheritance."

There is a fallacy underlying this argument. The learned vakil relies upon the text of the Hindu Law which says:

> "As regards the property of a hermit or an ascetic the heirs are in their order the proprietor, the virtuous pupil and the spiritual brother and associate in holiness." (*Yajnavalkya*, II. 138.)

In the case of a Chela or pupil succeeding to his Master there can be no difficulty as he is under the Hindu Law of inheritance the heir entitled to succeed. As the son is the heir of his father, so is the disciple the heir of his spiritual teacher. If, therefore, the matter stops there and the Chela succeeds by the mere reason of his being Chela, there can be no question that the succession is hereditary. Similarly if there are several Chelas and, by the usage of the Mutt, the office is transmitted according to certain definite rules of descent, say to the seniormost Chela, even then the office can rightly be said to be hereditary, for it vests on the death of the holder, in the person designated by law or usage as his heir. If, however, a particular Chela's title to succeed depends on his being preferred to the rest and nominated, by a voluntary act of the incumbent, it seems to me that such a claim cannot be described as a claim to a hereditary office. Such a nomination, it has been urged, is analogous to adoption; but this position seems to be unsound, as, though by some stretch of language the affiliation of a Chela may be said to amount to an adoption, it seems difficult to hold that nomination of one out of several Chelas stands on a similar legal footing. If there is a single Chela he succeeds by virtue of his being the heir. When there are several Chelas the position is that each of them having been affiliated has on this theory been adopted. Ex hypothesi, the particular Chela nominated is one of those that had been adopted. And is it suggested that nomination is equivalent to a second adoption? This argument shows the danger of extending the fiction of adoption and I am not prepared to hold that when one out of several Chelas is nominated to the office, his position is that of a heir who succeeds under the Law of Inheritance. The observations in *Achyutananda Das* v. *Jagannath Das* (1) were made with reference to the affiliation or adoption of a Chela, who, under the law, is entitled to inherit

1. (1914) 20 C W N 122 at 124.

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to the Guru and cannot have any bearing on the question at issue.

The appellant's learned vakil to be logical had to contend that although the nomination may be under a will of the late incumbent, the transmission must be deemed to be in the nature of a hereditary succession. This shows the fundamental unsoundness of the argument. Intestate succession and succession under a will are two distinct and entirely different conceptions known to law. To say that a person who succeeds under a will inherits as heir, is clearly a contradiction in terms. If the successor owes his title to nomination or appointment, that is, his succession depends upon the volition of the last incumbent and does not rest upon independent title, I am inclined to the view that the office cannot be said to be hereditary. In this case the appellant does not rest his title on his filling a particular legal character, say, that of a senior Chela who succeeds to the office whether he is nominated or not nominated ; and his claim therefore is not, in my opinion, one under Art. 124, for possession of a hereditary office. This is the view I am disposed to take on principle and on the reason of the thing and no case that has been cited at the bar compels me to take a different view.

In *Satyadeo Dass* v. *Santoke Dass* (2) it was found that the plaintiff was the late Mahant's only Chela and that in the mutt in question a Chela succeeds if there be one and if there be more than one a successor is appointed by the Mahant from amongst the Chelas. When it was found that the plaintiff was the only Chela, it was unnecessary to discuss the further question whether he was duly installed and nominated, but the Court for some reason discussed the evidence bearing on that point and found that the plaintiff was duly appointed. In the course of the judgment the word "hereditary" is used in connection alike with the succession of the only Chela as well as the Chela preferred out of many. (*See* page 364). The learned vakil relies upon this passage but I do not think that from the casual use of a word like this such a legal inference can be drawn. The appellant next relies upon what may be said to be implied in a dictum in *Sita Pershad* v. *Thakur Das* (3). Here again there is neither a direct nor an indirect statement bearing on the question but from the use of the word "hereditary" in connection with succession resting upon appointment it is urged that the pass-

2. (1907) 5 C L J 360. 3. (1879)) 5 C L R 73 at 90.

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age may be treated as an authority in favour of the appellant. I cannot agree to this. In *Raghubhushana* v. *Vidyavaridhi* (4) there is an observation to the effect that spiritual affiliation is analogous to adoption, but as I have already shown, this is beside the point. In *Achyutananda Das* v. *Jagannath Das* (1) there is a passage where it is said that the office of the Chief Mahant is hereditary and devolves upon the chief disciple of the Mahant "who moreover usually nominates him as his successor." It was not intended to state the law in this passage and this cannot be availed of by the appellant. I have already referred to this case on another point. In *Sammantha Pandara* v. *Sellappa Chetti* (5) the word "inheritance" occurs in respect of a disciple chosen who succeeds to the property. This cannot warrant the inference that the learned Judges intended to lay down that the office is hereditary. I do not think it worth while to discuss in detail *Rangachariar* v. *Yegna Dikshitar* (6), *Tiruvambala Desikar* v. *Manikkavachaka Desikar* (7) and *Kailasam Pillai* v. *Nataraja Thambiran* (8) as the dicta in each of the cases afford very little basis for the contention put forward. *Rajah of Palghat* v. *Raman Unni* (9) has also been relied on by the appellant. It was held there that adverse possession for over the statutory period of the office of trustee against a prior stanee is a bar to a suit by his successor. Dealing with the position of a stanam-holder under the law of Malabar, the learned Judges said that a stanam is descendable in a peculiar line of succession and that each successive holder is in the same position as an ordinary heir succeeding on intestacy. There is a statement in the judgment that the succession to mutts and stanam stands on the same footing. On the strength of this, it is contended that when a person succeeds to the office of the head of the Mutt by nomination he must be deemed to succeed as if on intestacy. There is clearly no warrant for this suggestion and indeed any such inference is repelled by the sentence in the same judgment. "In either case (in the case of an ordinary heir or that of a stanee) it is the law of the land and not any act of the previous holder or owner that confers title on the successor." None of the cases that have been cited to us has any direct bearing on the question. But the learned vakil for the appellant has been

1. (1914) 20 C W N 122. 4. (1916) 34 I C 875.
5. (1879) I L R 2 M 175. 6. (1890) I L R 13 M 524 at 536.
7. (1915) I L R 40 M 177: 30 M L J 274.
8. (1916) 32 M L J 271. 9. (1917) I L R 41 M 4: 33 M L J 26.

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able to place before us these various dicta which according to him implies that his position is correct. I am not prepared to take this view.

In the result I hold that on the allegations in the plaint the suit is governed by Art. 120 of the Limitation Act and that it is barred by limitation. The appeal fails and is dismissed with costs as stated by my learned brother.

Krishnan, J. :—I agree with my learned brother that this appeal fails.

There can be no doubt that the rule of succession to the deceased Mahant as stated in the plaint in this Mutt is one by nomination by him of his successor from among his Chelas. The plaintiff clearly bases his claim on being the person so nominated and on no other ground. The allegation that he is the patta Chela or principal Chela and that he is a fit person to be the Mahant are made to show that his nomination is unexceptionable but no claim to the Mahant's office is based on those allegations. The matter is made quite clear by the form in which he got the firse issue framed which runs thus :—

> "Whether plaintiff was duly nominated as his successor by the late Mahant and if so whether plaintiff is *therefore* entitled to succeed to the office of Mahant."

This is the sole issue raised as to plaintiff's title.

The question that then arises for decision on the plaint allegations is whether the office of the Mahant of the suit Mutt is a hereditary office within the meaning of Art. 124 of the Limitation Act. If that article does not apply the only article that can be applied for the recovery of that office is Art. 120. [See *Kidambi Raghavachariar and others* v. *Tirumalai Asari Nallur Raghavachariar* (10) and *Jagannath Das* v. *Birbhadra Das* (11)]. Art. 144 was sought to be relied on so far as the suit seeks recovery of possession of the immoveable properties of the Mutt but as they go with the Mahantship, if plaintiff is barred from claiming the office, he cannot get the properties.

Where succession is by nomination by the holder in office of his successor it seems to me impossible to contend that it is a hereditary succession. Hereditary succession is succession by the heir to the deceased under the law, the office must be transmitted to the successor according to some definite rules of descent which by their own force designate the person to succeed. There need be no blood relationship between the deceased and his successor but the right of the latter should

10. (1902) I L R 26 M 113. 11. (1892) I L R 19 C 776.

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not depend upon the choice of any individual. If the rule were that the senior living Chela of the Guru succeeds to his office on his death that might be a case of hereditary succession, even if the Guru nominated him as his successor, when no rights flowed from such nomination. But where the right to succession is based solely on nomination, I agree with my learned brother that the succession cannot be treated as hereditary.

Stray sentences quoted by the appellant's vakil in the cases which he cited and which have been referred to by my learned brother cannot be treated as any authority on the point before us. On the other hand, the case in *Jagannath Das* v. *Birbhadra Das* (11) referred to above is in point and against him. It is true that it was a case of election but the learned Judge treated the cases of election and nomination as standing on the same footing. Art. 124 cannot therefore apply to the present case and the suit was rightly dismissed as barred by limitation. I agree that the appeal should be dismissed with costs. The appellant will pay the Court-fees to the Government.

A. S. V. *Appeal dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE WALLACE.

R. Subbaroya Goundan ... *Petitioner** (*Respondent*)

v.

P. Muthukumaraswami Goundan ... *Respondent* (*Petitioner*).

Subbaroya Goundan v. Muthukumaraswami Goundan.

Madras Local Boards Act (XIV of 1920), Ss. 56 (4) and 57 (3)—Scope of—Failure to attend meetings of the Board for three consecutive months—Restoration to office—Mode of—"Ceased to be a member"—Deemed to be qualified—Meaning of.

The President of a Taluk Board failed for three consecutive months to attend meetings of the Board. The acting President did not report the matter to the Board and no action was taken under S. 56 (4) of the Madras Local Boards Act. But he was re-elected President at a meeting held after he had ceased to be a member under S. 56 (1) (*h*). The District Judge was moved under S. 57 and he decided that the petitioner had ceased to be a member. *Held,* in revision (1) the Board could restore him to membership only under S. 56 (4) when the matter is reported to it at the next meeting and that not having been done, the Board could not be held in effect to have restored him by electing him as President on a subsequent date; (2) S. 57 (3) was not intended to mean that a member who had failed to attend three consecutive meetings nevertheless remained a member until there was an adverse decision against him under S. 57; the object of that sub-section is only to prevent the proceedings of meetings in which a member, who on an inquiry under S. 57

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*C R P No. 37 of 1926. 29th April, 1926.

11. (1892) I L R 19 C 776.

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has been declared to have ceased to be a member, had continued to attend and take part being invalidated by his having taken part, and is similar in intention to S. 35.

Meaning of the expressions "who has ceased to be a member", and "deemed to be qualified" pointed out.

There are only two ways in which a member who has *prima facie* ceased to be a member of a Local Board under S. 56 (1) (*h*) can be restored to office. The Board can restore him under S. 56 (4) and the District Judge may declare under S. 57 that he never ceased to be a member. These are independent and not interdependent.

Petition under S. 115 of Act V of 1908 and S. 107 of the Government of India Act praying the High Court to revise the order of the District Court of Coimbatore in O. P. No. 78 of 1925.

T. R. Ramachandra Aiyar and *K. S. Venkatrama Aiyar* for petitioner.

T. M. Krishnaswami Aiyar for respondent.

The Court delivered the following

JUDGMENT:—This revision petition raises a question of the interpretation of Ss. 56 and 57 of the Madras Local Boards Act (XIV of 1920) a matter involved in some difficulty because of the loose drafting of the language of the sections.

The petitioner, who was the President of the Taluk Board of Palladam, failed for three consecutive months to attend the meetings of the Board. S. 56 says that in such a case, "subject to the provisions of S. 57," he shall cease to be a member of the Board. The three months expired on 21st September, 1925. S. 56 (4) says :

"In the case of a person who has ceased to be a member in consequence of failure to attend meetings, the matter shall be reported by the President at the next meeting of the Local Board which may at that meeting restore such person to office."

In the present case the Acting President did not report the matter and therefore the petitioner has not been restored to office under that sub-section. S. 57 permits an application to the District Judge in cases of doubt under S. 56, on which the District Judge shall make an enquiry and determine whether or not the member is disqualified under S. 56, and his decision shall be final. Sub-section (3) of that section says :

"Pending such decision the member shall be deemed to be qualified."

The petitioner relies upon this sub-section (3). As I understand his case, it is that, since S. 56 has to be read subject to the provisions of S. 57, the former section does not come into operation by itself, but only in conjunction with and after an enquiry under S. 57, and that therefore no member ceases

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to hold office under S. 56 unless and until the District Judge has been moved and has held an enquiry under S. 57 and has so declared, and that until such declaration he remains by force of sub-section (3) a member. It is true that in the present case the District Judge has under S. 57 declared that the petitioner has ceased to be a member; but the petitioner pleads that the District Judge has come to that conclusion through an error of law and misinterpretation of the sections, considering himself too strictly bound by the terms of S. 56. It is, however, obvious that it was the primary duty of the District Judge, in an enquiry under S. 57, to determine whether under the terms of S. 56 the petitioner has ceased to hold office. That the District Judge did and has held that he did so cease. His decision under S. 57 is final unless his order was without jurisdiction or in an irregular exercise of jurisdiction.

It is contended (1) that as the petitioner was elected President on 5th October, 1925, the Board had in effect restored him to office, and (2) that the District Judge was wrong in holding that he had ceased to hold office because by the force of S. 57 (3) he remained a member pending the decision of the Judge and therefore had not ceased to be a member. I do not think that either of these contentions is well founded. As to (1) the Board could restore him as a member only under S. 56 (4). That procedure was not adopted. No doubt it seems an anomaly that no member can compel the President to report such a matter to the Board. But that is how the law runs, and if the President does not choose to report the matter to the Board, then the Board under the law has no power to restore him.

It is contended that the language of S. 56 (4) "who has ceased to be a member" is not happy, and it means something else than "ceases to be a member." The language seems to me definite and clear and must be taken to mean what it says. In this connection reference may be made to the judgment of Ramesam, J., in *S. K. Devasigamany* v. *M. R. Sethurathnam Aiyar* (1).

As to the second point it seems to me clear that S. 57 (3) was not intended to mean that a member who had failed to attend three consecutive meetings nevertheless remains a member until and unless there is an adverse decision against him under S. 57. If it were so, S. 56 (4) would have no point. The Board could not restore one who had not ceased to be a

1. (1924) 87 I C 365.

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member. There are two ways in which a member who has *prima facie* ceased to be a member can be restored. (1) The Board can restore him under S. 56 (4), and (2) The District Judge may declare under S. 57 that he never ceased to be a member. Obviously, these are independent and not inter-dependent. In most cases there would not be time to get a decision under S. 57 before the next meeting at which alone S. 56 (4) can be invoked. Therefore the operation of S. 56 (4) does not have to await the declaration by the District Judge under S. 57 that the member has ceased to be a member. That means that the member has ceased to be a member even before S. 57 can be invoked. Again S. 57 (3) does not say that he remains a member. It says that he shall be "deemed to be qualified." That was intended, I have no doubt, to prevent the proceedings of meetings in which a member who on an enquiry under S. 57 has been declared to have ceased to be a member had continued to attend and take part being invalidated by his having taken part, and is similar in intention to S. 35. There is no justification in the language of S. 57 for holding that the mere presentation of an application under S.57 has the effect of restoring *pro tem.* to office one who has ceased to hold office.

Prima facie then, the petitioner ceased under S. 56 to be a member. If no application had been put in under S. 57 and he is not restored under S. 56 (4), then his cessation continues. If an application was put in under S. 57 and the District Judge decided that he did cease to be a member, then he did cease to be a member from the date fixed in S. 56, but for the purpose of saving the validity of proceedings in which he may have taken part after he had ceased to be a member he is deemed to be qualified during that period.

From another point of view the same result is indicated. There is no limitation for an application under S. 57 and one might never be put in at all. This does not mean, for example, that a person of unsound mind, deaf mute, a leper, a convict, an insolvent, etc., remain members until some one takes out an application under S. 57 to the District Judge. These persons cease *ipso facto* to be members, as S. 56 states, and the proviso to S. 56, "subject to the provisions of S. 57" can only mean that in cases where an application under S. 57 is put in, the operation of S. 56 is not final, but is subject to the decision of the District Judge under S. 57.

Another contention has been put forward, viz., that failure implies a voluntary act, *i. e.*, that the non-attendance

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should not be due to matters not within the control of the member. I can see no warrant for this view. If it had been so intended, it would have been easy to use the phrase "voluntarily absents himself" instead of "fails". This point was not raised before the District Judge.

I must hold therefore that the District Judge has not acted without jurisdiction or in an irregular exercise of jurisdiction. He has decided, and had jurisdiction to decide, that the petitioner ceased to be a member on 21st September, 1925, and his decision is final.

I must therefore dismiss this petition with costs.

T. S. V. *Petition dismissed.*

[FULL BENCH.]

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE KRISHNAN, MR. JUSTICE RAMESAM AND MR. JUSTICE VENKATASUBBA RAO.

T. S. Balavenkataseetharama Chettiar and another ... *Appellants** (*Petitioners*)

v.

The Official Receiver, Tanjore, and others ... *Respondents* (*Respondent and persons added parties*).

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Provincial Insolvency Act (*V of* 1920), *Ss.* 2 (*d*), 17 *and* 28—*Joint Hindu family—Father adjudicated insolvent—What vests in Official Receiver—Share of sons or father's power to sell—Death of father pending proceedings—Effect of.*

An Official Receiver in whom the property of an insolvent Hindu governed by the Law of Mitakshara is vested under the Provincial Insolvency Act (V of 1920) is entitled to sell the joint family property of the insolvent and his sons for debts which are neither illegal nor immoral. What vests in the Official Receiver is not the undivided interest of the sons, but the Hindu father's conditional power of disposal over his sons' interests. The decision of the Judicial Committee in *Sat Narain* v. *Behari Lal,* (1924) I L R 6 Lah 1: 47 M L J 857 (P C) considered and its scope explained; the language in the Presidency Towns and Provincial Insolvency Acts adverted to; *Kuppuswami Goundan* v. *Marimuthu Goundan,* (1924) 47 M L J 487 overruled.

The death of the father pending the insolvency proceedings does not put an end to the Official Receiver's power to sell the interests of the sons also, as under S. 17 of the Provincial Insolvency Act the proceedings are to continue till the properties are realised and distributed.

Per Krishnan, J.—S. 28 which is the vesting section vests the whole of the property of the insolvent in the Official Receiver ; and under it the insolvent's share as well as his power to sell his sons' interests will

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vest in the Receiver. It is not necessary to pray in aid the definition of "property" in S. 2 (*d*) for this purpose.

Per Venkatasubba Rao, J.—The expression "property" in S. 2 (*d*) includes also the qualified and restricted power of a Hindu father to dispose of his son's share.

Appeal against the order of the District Court of West Tanjore at Tanjore, dated the 15th December, 1924 in I. A. No. 455 of 1924 in I. P. No. 5 of 1922.

T. Rangachariar and *K. Narasimha Aiyangar* for appellants.

S. Varadachariar and *T. M. Krishnaswami Aiyar* for respondents.

The Court delivered the following

rishnan, J

JUDGMENTS:—*Krishnan, J.*:—The point for decision in this appeal is whether the Official Receiver in whom the property of an insolvent Hindu governed by the Law of Mitakshara is vested under the Provincial Insolvency Act V of 1920 is entitled to sell the joint family property of the insolvent and his sons for his debts, they being neither illegal nor immoral. The Lower Court has held that he could and has upheld the sale by him. The appellants contend that he has no such power.

The rulings of this Court have been in favour of recognizing such power and holding such sales to be valid both in the Presidency Town and in the mofussil. [See *Official Assignee of Madras* v. *Ramachandra Aiyar* (1), *Sellamuthu Servai, In re* (2), *Sankaranarayana Pillai* v. *Rajamani* (3) and *Kuppuswami Goundan* v. *Marimuthu Goundan* (4)]. There was a difference of opinion as to whether the power to sell the joint property alone vested in the Official Assignee or Receiver or whether the undivided share itself of the sons vested in him. In the first three cases quoted above it was ruled that the power alone vested but in *Kuppuswami Goundan* v. *Marimuthu Goundan* (4) the opinion was expressed that the share itself vested. But all the cases were agreed that the Official Assignee or Receiver was entitled to sell the whole joint property and give a good title to the purchaser provided that the debts were such as the sons were, on account of their pious obligation, bound to pay from their joint property.

The question has again been raised now on account of the recent ruling of the Privy Council in *Sat Narain* v. *Behari*

1. (1922) I L R 46 M 54 : 43 M L J 569.
2. (1923) I L R 47 M 87: 46 M L J 86 (F B).
3. (1923) I L R 47 M 462: 46 M L J 314.
4. (1924) 47 M L J 487.

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Lal (5) and it is contended that the result of that decision is to compel us to hold that neither the shares of the sons nor the power to sell such shares vests in the Official Receiver and that he can proceed against the sons' share if at all only by way of suit. The Privy Council has no doubt clearly laid down that the shares of the sons do not vest in the Official Assignee. That decision was under the Presidency Towns Insolvency Act and one of the arguments used by their Lordships to arrive at their conclusion is based on the existence and the language of S. 52 of that Act, a section which finds no counterpart in the Provincial Insolvency Act. Nevertheless as the other arguments apply equally to the latter Act it seems to me that we must hold that the same principle governs cases under it in the mofussil. As a result we must overrule the decision in *Kuppuswami Goundan* v. *Marimuthu Goundan* (4) in so far as it holds that the undivided share of the son itself vests in the Official Receiver.

That does not however carry the appellants far enough to enable them to succeed in their appeal, for, if the Official Receiver has got the father's power to sell the joint property vested in him, he will be entitled to sell the whole joint property himself. It is therefore argued for the appellant that though under the Presidency Towns Insolvency Act such a power may be vested in the Assignee by virtue of S. 52 there is no provision in the Provincial Insolvency Act to so vest it. I do not think the Legislature intended to make any such distinction between the Madras and the mofussil insolvencies as suggested by this argument. It cannot be said that their Lordships of the Privy Council laid down that such a power will not pass to the Official Assignee ; it was not necessary for them to do so for the purpose of the case before them which was one of a right of pre-emption claimed by the insolvent's son as owner of his share of the family property. The vesting of a power to sell it in the Official Assignee would not interfere with that right till he actually exercises that power and sells : a thing which had not been done in that case. In fact their Lordships expressly say : " It may be that under the provisions of S. 52 or in some other way that property (*i. e.* the joint property) may in a proper case be made available for the payment of the father's just debts." The contention, however, is that the effect of their Lordships' judgment is to prevent any vesting of such a power in mofussil cases at

4. (1924) 47 M L J 487.
5. (1924) I L R 6 L 1: 47 M L J 857 (P C).

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any rate as there is no express provision for it in the mofussil Act. It seems to me, however, that the provisions we have in the Act are sufficient to vest such a power. Section 28, which is the vesting section, vests the whole of the property of the insolvent in the Official Receiver. In the joint family property the insolvent father is not only entitled to his own share but has also got a power to sell the whole property including the son's share for payment of his just debts. It seems to me that under S. 28 itself his share as well as the power will vest in the Receiver as the insolvent's property. It is not necessary to pray in aid the definition of "property" in S. 2 (*d*) for this purpose. There may be a difficulty in doing so as their Lordships seem to have been of opinion that S. 2 (*e*) of the Presidency Towns Insolvency Act, the wording of which is the same as that of S. 2 (*d*), of the Provincial Insolvency Act, contemplates only an "absolute and unconditional power of disposal" which a father's power is not as it depends upon the existence of debts liable to be satisfied out of the son's share. S. 28, however, by itself is enough, it seems to me, to vest that power in the Receiver as a species of property belonging to the father.

Now it is argued that a power can never be treated as property and reliance is placed upon the case of *Ex parte Gilchrist, In re Armstrong* (6), especially on the judgment of Fry, L. J., on page 531. In that case the learned Judges were dealing with what is called a general power of appointment under the English Law which is a very different thing in law from the power of the Hindu father under the Hindu Law which we are dealing with. S. 52 of the Presidency Towns Insolvency Act itself speaks of such a power or capacity of the father to sell as a species of property. I hold therefore that the Receiver had in this case the power to sell the whole joint property to pay the father's debts as they were neither immoral nor illegal debts and his sale must be upheld.

I am fortified in my view as the same view was taken by a Bench of this Court in C. M. A. No. 115 of 1925 unreported and also by the Lahore High Court in *Khem Chand* v. *Narain Das* (7). There is an expression of opinion to the contrary by Macleod, C. J., in *Shripad* v. *Basappa* (8) who says on p. 787: "Speaking for myself, I do not think that when the manager of a joint Hindu family is adjudicated insolvent, the power which he had before his insolvency to dispose of family

6. (1886) 17 Q B D 521. 7. (1925) I L R 6 L 493.
8. (1925) I L R 49 B 785.

estate for proper purposes, must be considered as vesting in the Receiver or Official Assignee." It does not seem to be a considered opinion nor is it shared by Coyajee, J., who sat with him. The Chief Justice makes no reference to S. 52 of the Presidency Towns Insolvency Act. With all respect I am unable to accept the Chief Justice's dictum.

In this case one further argument has to be considered and that is that because the insolvent father died before the Receiver effected his sale, the sale was without authority and void. It is argued that the power came to an end with the death of the father and that the Receiver was no longer entitled to exercise it. For this argument reliance is placed on the case of *Nichols to Nixey* (9). The answer to this contention is provided for by S. 17 of the Act which deals with cases where the insolvent debtor dies pending proceedings in insolvency. That section enacts that unless the Court otherwise orders, the proceedings shall be continued so far as may be necessary for the realisation and distribution of the property of the debtor. The power of sale can thus be exercised for the realisation of the assets of the insolvent even though he is dead. The English case cited is thus not applicable.

The appeal fails and is dismissed with costs, to be paid out of the estate, of the Official Receiver and alienees each one set.

Ramesam, J.

Ramesam, J.:—As I agree with the judgments of my learned brothers, I will briefly give my reasons for doing so.

Having regard to the reference to S. 52 of the Act at page 24 of the judgment in *Sat Narain* v. *Behari Lal* (5), I think there is very little doubt that the Privy Council intended to hold that the right of alienation of a Hindu father in respect of joint family property passes to the Official Assignee under the Presidency Towns Insolvency Act. I think the point is not capable of much argument. The more difficult question that arises before us is, whether in the case of the Provincial Insolvency Act the absence of a provision like S. 52 makes any difference, and, if so, what? The question turns upon what construction one may place on the definition of 'property' in S. 2 (*d*) of the Act. This definition is identical in language with S. 2 (*e*) of the older Provincial Insolvency Act III of 1907 which has been repealed by the present Act. On the one hand Mr. Varadachari contends that seeing that, under the Civil

5. (1924) I L R 6 L 1 : 47 M L J 857 (P C).
9. (1885) 29 Ch D 1005.

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Procedure Code of 1882 which contained provisions relating to Provincial Insolvency, S. 266 should vest in the Receiver and that the Provincial Insolvency Act is only intended to consolidate the preceding state of the law, the definition of the word 'property' in the Provincial Insolvency Act ought to be construed so as to include the property itself and not merely the father's rights over it. To this argument, however, there are three replies. First, the Privy Council have pointed out that decisions under the Civil Procedure Code ought not to be used for construing the Insolvency Acts. The Code had a history of its own culminating in S. 53 of the present Code of 1908. Secondly, the House of Lords in *Bank of England* v. *Vagliano Bros.* (10) condemned this mode of construing an Act, that is, we ought to look at the Insolvency Act by itself and not to be influenced by the fact that it was a continuation of the previous Civil Procedure Code of 1882. Thirdly, the identical words in the Presidency Towns Insolvency Act have been construed by the Privy Council in *Sat Narain* v. *Behari Lal* (5) as applying only to property over which the insolvent had absolute power of disposal and until we see a reason to the contrary in the Act we are now considering I think, if possible, the words in this Act ought to receive the same construction. I must therefore reject Mr. Varadachari's contention that the property (including the son's share) itself vests in the Official Assignee. On the other hand it is contended by Mr. Rangachari that not even the father's rights over the property passed to the Official Assignee. Now, there is no doubt that the word 'property' may include without doing any violence to the term the rights of a Hindu father over joint family property under the Mitakshara Law. This is shown by S. 52 in the Presidency Towns Insolvency Act. The only question is, whether we should construe the word 'property' in the Provincial Insolvency Act so as to exclude such rights. I am not able to see any reason why we should—the absence of a section like S. 52 of the Presidency Towns Insolvency Act throwing no light on the matter. I therefore agree with the conclusion of my learned brothers.

On the third point, namely, whether the death of the insolvent makes any difference, I agree that it does not.

Venkatasubba Rao, J.

Venkatasubba Rao, J.:—This appeal raises a very important question, namely, what is the effect of the decision of the Judicial Committee in *Sat Narain* v. *Behari Lal* (5) ? The

5. (1924) I L R 6 L 1: 47 M L J 857 (P C).
10. (1891) A C 107.

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Hindu Law recognises the power of a father, subject to certain conditions and restrictions, to deal with his son's undivided interest in joint family property. On a father being adjudicated an insolvent, what is the nature of the right, if any, that passes to the Official Assignee or the Official Receiver as the case may be? This is the question that this appeal raises. The appellants before us are the sons of an insolvent and they challenge the act of the Official Receiver, who, for paying off the father's debts, exercised the power to sell the son's interest also in family properties. The learned District Judge has held that the Receiver could validly exercise such a power in respect of debts not shown to be either illegal or immoral.

Mr. Rangachari, the appellants' learned vakil, contends before us, that the judgment of the Judicial Committee must be taken to amount to a pronouncement, that on a father being adjudicated an insolvent, neither the son's undivided share nor the father's conditional power to dispose of that share, vests in the Official Assignee. The case decides unmistakably so far as the Presidency Towns Insolvency Act is concerned, that the son's share as such does not vest in the Official Assignee. Does it further decide that the insolvent's conditional power to dispose of his son's interest does not also pass to the Official Assignee? The case having been decided with reference to the Presidency Towns Insolvency Act, a further question arises, what is the bearing of that decision on the scope, in this respect, of the Provincial Insolvency Act—the Act under which the present appeal has to be decided?

The points raised being of considerable importance, this Bench, consisting of three Judges, has been specially constituted to hear this appeal.

In order to understand properly the decision of the Judicial Committee, it is necessary to have regard first to the facts with reference to which the judgment was given, and, secondly, to bear in mind the divergent views on the subject taken by the Courts in India. In the case before the Privy Council, the question arose in regard to the right of pre-emption, which a son as a member of a joint family, claimed to exercise, after adjudication of his father, as an insolvent; and against the son the contention was put forward that the entire property having previously vested in the Official Assignee, the son ceased to have any proprietary interest in the property which would entitle him to exercise the right of pre-emption. A Full Bench of the Lahore High Court decided that on adjudication of the

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father which was before the suit, the son's undivided interest also passed to the Official Assignee and that consequently there was no right left in the son outstanding, which could be enforced in the suit. Did the undivided share of the son vest or not vest in the Official Assignee? This was the question that the Judicial Committee had to decide, and disagreeing with the Full Bench of the Lahore High Court their Lordships held that it did not vest. If the High Court had held that what passed to the Official Assignee was not the son's undivided interest but the father's conditional power of disposal, the plaintiff's suit would not have been dismissed. In the light of these facts is there anything to show that the Judicial Committee intended to lay down that even the disposing power of the father did not pass? That the Judicial Committee has not said so in express terms is not disputed. The decreeing of the plaintiff's claim is not inconsistent, as I have said, with the recognition of the father's disposing power having passed to the Official Assignee.

Then, in regard to the views held by the Indian Courts, there was a sharp divergence of opinion as to what vested in the Official Assignee on the adjudication of a Hindu father belonging to a joint undivided Hindu family. To bring out the real point at issue, I shall refer to a few recent cases decided by the High Courts in India. In the *Official Assignee of Madras* v. *Ramachandra Aiyar* (1) the Official Assignee contended that on the adjudication of the father, the interest of the minor sons of the insolvent in the family property vested in him. Sir Walter Schwabe, C. J., who delivered the judgment of the Court consisting of himself and Coutts Trotter, J., observes that it may be taken as established law, that the Official Assignee is not entitled to have vested in him the shares of the other members, although he can deal with them if the insolvent could lawfully have done so had there been no insolvency. In *Sellamuthu Servai* v. *Ramaiya* (2) the question had to be considered whether the Privy Council decisions in *Sahu Ramachandra* v. *Bhup Singh* (11) and *Chet Ram* v. *Ram Singh* (12) affected the law as understood, in regard to the Official Assignee's power to deal with the son's interest during the insolvent's life-time. In each of the three separate judgments that were delivered, the point is emphasised that the accepted law is, that it is the father's power that vests in the Official Assignee

1. (1922) I L R 46 M 54: 43 M L J 569.
2. (1923) I L R 47 M 87: 46 M L J 86 (F B).
11. (1917) I L R 39 A 437: 33 M L J 14 (P C).
12. (1922) I L R 44 A 368: 43 M L J 98 (P C).

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and not the undivided share of the son. Coutts Trotter, J., says thus :—

"It was decided by a Bench of this Court consisting of two members of the present Bench in *Official Assignee of Madras* v. *Ramachandra Aiyar* (1) that the Official Assignee, though it cannot be said that the shares of the minors actually vest in him, has nevertheless the same rights of disposition of the family property for the satisfaction of the debts of the manager as the manager would himself have been entitled to exercise, if he had not been adjudicated insolvent."

Krishnan, J. refers to it as settled law, that if the father has the right to sell the whole joint estate to pay off his antecedent debts, that power can be exercised by the Official Assignee. In *Sankaranarayana Pillai* v. *Rajamani* (3), the law was again stated in similar terms. Phillips, J. observes :—

"Applying this principle to the present case, we find that the Official Receiver had power to sell not only the share of the adult insolvents but also it vested in him the power of these insolvents as father to sell their sons' interest in the property for the payment of antecedent debts."

In my own judgment in that case, I expressed myself thus:

"The learned Subordinate Judge has found that the debts of the 1st and 2nd defendants were not incurred for illegal or immoral purposes and it is now a settled rule that the Official Receiver can exercise the right of the father to dispose of the son's interest in ancestral immoveable estate for the payment of the father's debts not tainted with illegality or immorality."

The first two cases arose under the Presidency Towns Insolvency Act and the third under the Provincial Insolvency Act and in each of these cases it was assumed that what vested in the Official Assignee was not the undivided share of the son but the conditional power of disposal possessed by the Hindu father.

The point again came up before a Bench of the Madras High Court in *Kuppuswami Goundan* v. *Marimuthu Goundan* (4). That was a case under the Provincial Insolvency Act. It was there decided, contrary to the trend of the authority of this Court, that the entire undivided interest of the son vested in the Official Receiver as distinguished from the mere disposing power of the father. Spencer, O. C. J., thought that *Official Assignee of Madras* v. *Ramachandra Aiyar* (1) was wrongly decided owing to a concession erroneously made by the Advocate-General who argued that case and preferred to follow the judgment of the Lahore High Court in *Behari Lal* v. *Sat Narain* (13), the very same decision which was later upset by the Privy Council in the case

1. (1922) I L R 46 M 54: 43 M L J 569
3. (1923) I L R 47 M 462: 46 M L J 314.
4. (1924) 47 M L J 487.
13. (1922) I L R 3 L 329 (F B).

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cited at the opening of this judgment, *Sat Narain* v. *Behari Lal* (5). Srinivasa Aiyangar, J., who concurred with Spencer, O. C. J., felt bound to follow the Lahore decision and held that the share itself vested. He observed, however, that if the matter had been *res integra* he would have taken the view that it was the bare power that vested and not the corporeal undivided interest.

It was after these cases were decided by the Madras High Court that the question was raised before the Judicial Committee in the appeal from the Lahore case. The Madras cases to which I have made reference illustrate the conflict that prevailed in the Indian Courts on this question. Sir Shadi Lal, C. J., as one of the members of the Full Bench of the Lahore High Court, clearly indicated that if he had not been bound by authority he would have held that what vested was only the father's conditional power and not the son's undivided share. The Privy Council directed the whole of their judgment to show that the Lahore High Court's view, namely, that the share itself vested in the Official Assignee, was wrong. When their Lordships expressly say that they disapprove of one of these aforesaid two views, it seems to me that it would be most improper to read into their judgment, an intention to overrule by implication, the other and the exactly opposite view which had been repeatedly taken on this subject. These considerations seem to me to point strongly to the fact that the Judicial Committee could not have intended to lay down the very wide proposition for which Mr. Rangachari contends.

A careful examination of the judgment itself leads me, on the contrary to the conclusion, that their Lordships recognise that although the son's undivided share does not pass, the father's conditional power of disposal does pass. Reference is made to S. 2 (*e*) where the word 'property' is said to include any property over which or the profits of which any person has a disposing power which he may exercise for his own benefit. They then refer to S. 52 (2) (*b*) which enacts that the property of the insolvent shall comprise the capacity to exercise all such powers in respect of property as might have been exercised by the insolvent for his own benefit at the commencement of his insolvency Under the first of these sections, it is the property that vests, under the second, it is the power that vests, and their Lordships point out that it is difficult to reconcile S. 52 with the proposition that the property itself vests in the Assignee. While thus they reject the doctrine

5. (1924) I L R 6 L 1: 47 M L J 857 (P C).

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that the property vests, they impliedly accept the theory that the power vests. They again refer to S. 52 as containing a provision which enables the Official Assignee to have recourse to the son's share for the payment of the father's just debts. S. 52 can be invoked only by reason of the fact that under the section, the property that vests in the Official Assignee includes the capacity to exercise a power of disposal. The following sentence in their Lordships' judgment makes their meaning even more clear :—

"It is certainly a startling proposition that the insolvency of one member of the family should of itself and immediately take from the other male members of the family their interests in the joint property and from the female members their right to maintenance and transfer the whole estate to an assignee of the insolvent for the benefit of his creditors."

It admits of no doubt, that what their Lordships were combating in the whole of their judgment, was the view that the physical, corporeal, undivided shares of the son immediately vests in the Assignee as contrasted with, and distinguished from, the bare right of conditional disposal possessed by the Hindu father. It is also significant that it is stated towards the close of their judgment that the cases cited by their Lordships are not inconsistent with the conclusion at which they have arrived.

I am therefore satisfied that *Sat Narain* v. *Behari Lal*(5) is not an authority for the proposition that under the Presidency Towns Insolvency Act the conditional power of disposal of the father does not vest in the Official Assignee.

I shall now proceed to deal with the second part of the question, viz., what bearing has this ruling on the scope of the Provincial Insolvency Act in this respect ? The argument for the appellant may be shortly put thus: Section 2 (*e*) of the Presidency Towns Insolvency Act is identical in language with S. 2 (*d*) of the Provincial Insolvency Act. The interpretation put by the Judicial Committee on S. 2 (*d*) must therefore hold good in respect of S. 2 (*e*).

It is next urged that S. 2 (*e*) has been construed as referring only to property over which the insolvent has an absolute and unconditional power of disposal, whereas a Hindu father's right is only a conditional right. The answer is twofold. Their Lordships were concerned with pointing out that S. 52 which vests merely the power, is irreconcilable with S. 2 (*e*) which vests the property. In regard to S. 2 (*e*) at the top of page 22, after saying that property is defined as

5. (1924) I L R 6 L 1: 47 M L J 857 (P C).

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including any property over which any person has a disposing power which he may exercise for his own benefit, they go on to say :—

"And it may be said that a Hindu father's power to sell the joint property and apply the proceeds to the payment of his debts, is such a power."

Later on at the same page they observe :—

"And S. 2 seems to contemplate an absolute and unconditional power of disposal."

Their Lordships were clearly pointing out that the definition in S. 2 applied " unless there is something repugnant in the subject or context " and that S. 52 renders it repugnant to hold that in contravention of its express terms the property itself vests. However this may be, it seems to me to be somewhat far-fetched to suggest that such construction as might be deemed to have been placed upon the words in S. 2 (*e*) was intended to be absolute and final irrespective of the context or the enactment where those words may occur. In the Provincial Insolvency Act there is no provision corresponding to S. 52 (2) (*b*) which refers to the exercise of power over property. In construing therefore of S. 2 (*d*) in the Provincial Insolvency Act we are not hampered by the fact of co-existence in the same enactment of another provision in apparent or real conflict with that section. These very words have been used by the Indian Legislature in enactment after enactment, in *pari materia* with the Provincial Insolvency Act, to signify the conditional and restricted power possessed by a Hindu father. These identical words are used in S. 266 of the Civil Procedure Code of 1877 and 1882 and are reproduced in S. 60 of the present Code of 1908. In all these enactments, as in the Provincial Insolvency Act with which we are at present concerned, these words stand alone and are not controlled by a different set of words such as those that occur in S. 52 of the Presidency Towns Insolvency Act. It must be borne in mind that their Lordships throughout in their judgment repeatedly point out that their decision is given in respect of the Presidency Towns Insolvency Act alone. When the Law of Insolvency for the mofussil was a part of the Civil Procedure Code itself, S. 266 was referred to in S. 354 of the two earlier Codes, under which section the property of the insolvent vested in the Receiver. I am therefore of opinion that whatever be the meaning of the words in S. 2 (*e*) of the Presidency Towns Insolvency Act, the expression in S. 2 (*d*) of the Provincial Insolvency Act includes the qualified and restricted power of a Hindu father.

F. B.

Balavenkataseetharama Chettiar v. Official Receiver, Tanjore.

Venkatasubba Rao, J.

The only difficulty that still remains is, under this section, is it the property or the power that vests in the Official Receiver? The Privy Council have in very emphatic terms shown the unsoundness of the position that the property itself vests and although the Presidency Towns Insolvency Act alone was under discussion, their observations are of general application. In the face of those remarks it is impossible to hold that the property itself vests. Sir Shadi Lal, C. J. in the Lahore case, after adverting to cases under the Civil Procedure Code, felt bound to hold that it is the undivided share and not the qualified power that vests. It seems to me that there is nothing in the case decided under the various Codes that compels one to take the view that the property itself as distinguished from the power vests in the Official Receiver. The Legislature in using the phraseology it did in S. 2 (*d*) of the Provincial Insolvency Act did no more than intend to enact that the insolvent's property includes also, in the case of a Hindu father, his disposing power over his son's undivided interest. This construction seems to me to be equally applicable whether the words are used in the Civil Procedure Code or in the Provincial Insolvency Act. Till a contrary opinion was expressed in *Kuppuswami Goundan* v. *Marimuthu Goundan* (4) (which must now be regarded as overruled) this is the view that was taken by the Madras High Court in regard to the Presidency as well as the Provincial Insolvency Acts. In my opinion the authority of the Madras cases that have held that a Hindu father's qualified and restricted power to dispose of his son's undivided interest vests on his adjudication, in the Official Receiver has not been shaken by the recent pronouncement of the Privy Council in *Sat Narain* v. *Behari Lal* (5).

I may add that my view receives support from two cases decided since the Privy Council ruling, one, a decision of a Bench of this Court (Phillips and Madhavan Nair, JJ.) in C. M. A. No. 115 of 1925, and the other a decision of the Lahore High Court, *Khem Chand* v. *Narain Das* (7).

In the present case, after adjudication, the insolvent died. Does this fact make any difference? As the learned District Judge points out, S. 17 provides for this contingency, which runs thus :—

"If a debtor by or against whom an insolvency petition has been presented dies, the proceedings in the matter shall, unless the Court otherwise orders, be continued so far as may be necessary, for the realisation and distribution of the property of the debtor."

4. (1924) 47 M L J 487. 5. (1924) I L R 6 L 1 : 47 M L J 857 (P C).
7. (1925) I L R 6 L 493.

F. B.

Balavenkata-seetharama Chettiar v. Official Receiver, Tanjore.

Venkata-subba Rao, J.

Nichols to Nixey (9) has been cited for the proposition that the trustee cannot exercise a power of appointment after the death of the bankrupt, the donee of the power. The obvious answer to this is, that a decision which applies to powers in the ordinary legal sense of that term cannot be treated as an authority in regard to what is an entirely different thing, namely, the right, which has come to be described as power, under the Hindu Law of the father to dispose of his son's interest in the joint family property.

The appeal fails and is dismissed with costs as provided for in the judgment of my learned brother Krishnan, J.

T. S. V. *Appeal dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE WALLACE.

Vesu *alias* Lakshmi Amma and another ... *Appellants** (*Respondents Nos.* 2 *and* 3)

v.

Thekkedath Veetil Kannamma *alias* Kathyayani Amma and others ... *Respondents* (*Petitioners Nos.* 1 *to* 5, 7 *to* 13 *and Respondents Nos.* 1, 4 *to* 6 *and* 8 *to* 10).

Vesu v. Kannamma.

Malabar Law—Tarwad—Suit against—All members impleaded—Effect of—Appeal—Omission to implead one junior member and the legal representative of another—Decree in favour of appellants—Validity of—Representative character of karnavan—Civil Procedure Code, O. 41, R. 4—Applicability of.

In a suit against a Malabar tarwad, the karnavan and all the junior members were impleaded as parties. A decree was passed against them and confirmed on appeal and when the defendants filed a second appeal, the 13th defendant, a junior member (a minor), was not impleaded at all and the 10th defendant, another junior member, though really dead at the time of filing the appeal was included as one of the appellants and his legal representatives were not brought on record. The High Court reversed the decrees of the Courts below and when the defendants applied for restitution, the plaintiffs raised the objection that the necessary parties not being on record in the High Court, the decree passed in second appeal was void for want of jurisdiction and hence an application for restitution did not lie. *Held*, the karnavan of the defendants' tarwad having been on record throughout, the 10th and 13th defendants were not necessary parties to the appeal at all. The fact that the plaintiffs chose to make all the members of the defendants' tarwad parties to the suit does not deprive the karnavan of his ordinary character as manager and representative of the tarwad. The question is not so much whether he was specifically impleaded as karnavan as whether he was as a matter of fact not conducting the litigation for the tarwad and if it is found as a fact that he was, it does not matter if the other members were added or omitted to be added. Case-law referred to.

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*A A A O No. 93 of 1923. 26th March, 1926.

9. (1885) 29 Ch. D 1005.

Order 41, R. 4 of the Civil Procedure Code can apply only when the fact of the omission of the parties is brought to the notice of the Court and it consciously decides to apply the rule.

Appeal against the order of the Court of the Subordinate Judge of South Malabar at Palghat in A. S. No. 62 of 1921 (A. S. No. 296 of 1921 on the file of the District Court, South Malabar) preferred against the order of the Court of the Principal District Munsif of Palghat in E. P. No. 446 of 1920 in O. S. No. 202 of 1914 (A. S. No. 774 of 1915 and S. A. No. 2168 of 1918).

L. A. Govindaraghava Aiyar, P. S. Narayanaswami Aiyar and *P. S. Ramachandra Aiyar* for appellants.

C. V. Anantakrishna Aiyar and *P. R. Ramakrishna Aiyar* for respondents.

The Court delivered the following

JUDGMENT :—This C. M. S. A. is against the decision of the Lower Appellate Court in a matter of restitution reversing the decision of the first Court.

The restitution was applied for by the respondents on the strength of a decree of the High Court in second appeal reversing the decrees of both the Lower Courts and dismissing the plaintiffs' (appellants') suit. It appears that of the original appellants in the First Appellate Court, the 10th defendant, though dead before the second appeal was filed, was included as one of the appellants, and his legal representatives were not brought on record, and the 13th defendant was not included at all. The present appellant's contention in this matter of restitution has been that these errors vitiate the High Court's decree and render it void for want of jurisdiction since the necessary parties were not on the record and therefore no application for restitution under it can lie.

It will be noted that the objection that the High Court's decree is a nullity comes not from those defendants who were not made parties to the appeal but from the plaintiffs who say that they are entitled to benefit thereby to the extent of having the decree dismissing this suit declared a nullity. The plaintiffs' point is thus a purely technical one and there is nothing to commend it on the merits apart from the technical law, and I have to see if the technical law will justify their contention.

The original suit was by the plaintiffs' tarwad against the defendants' tarwad—the plaint and the written statement show that clearly. Instead of putting the tarwads on record only by and through their karnavan or other representative all the members of the plaintiffs' tarwad were arrayed as

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plaintiffs and all the members of the defendants' tarwad, thirteen in all, as defendants. On each side the actual karnavan was of course one of the parties to the suit—14th defendant on the plaintiffs' side and the 4th defendant on the defendants' side—and on the defendants' side the *de facto* manager, a woman (1st defendant) was also a party. These karnavans and this manager remained as parties throughout the whole of the litigation and are now parties to the present proceeding. There has been throughout no flaw in the array of parties on the plaintiffs' side, but, as mentioned, on the defendants' side there was in the second appeal a mistake in including the deceased 10th defendant as an appellant and not bringing on his legal representatives and in omitting the 13th defendant. It appears that the 10th defendant died after the vakalat was given to the vakil for the appeal, but before the appeal was actually filed. His legal representatives are said to include, besides the other members of the tarwad including the omitted 13th defendant, a male infant. 10th defendant was even on the date of his death a minor and the 13th defendant was an infant when the proceedings began and was about 5 or 6 years old at the date of the second appeal.

Now it goes without saying that no decree is binding on a party if he was a necessary party to the suit and he was not on record, and if the result of the judgment in second appeal had been a decree against necessary parties not on the record undoubtedly the interests of those parties would have been affected without their having had an opportunity of meeting the case against them, and in such circumstances the judgment against them would have been void, and in certain circumstances when their interests were inseparable from those of other judgment-debtors under the decree, the decree as a whole would have been void. This principle of law is laid down in several cases. [See *Bikramagit Rai* v. *Darohan Das* (1), *Imdad Ali* v. *Jagan Lal* (2), *Imam-ud-din* v. *Sadarath Rai* (3) and *Subramania Aiyar* v. *Vaithinatha Aiyar* (4)].

The question then is, were these minor members of the tarwad necessary parties to the defendants' second appeal when their karnavan and tarwad manager were throughout on record? It is argued that because the original suit was filed not against the tarwad as a unity represented by its head, but against the tarwad through each of its individual members, each one of these is a necessary party to all subsequent proceed-

1. (1924) 82 I C 26 : 22 A L J 1035. 2. (1895) I L R 17 A 478.
3. (1910) I L R 32 A 501. 4. (1913) I L R 38 M 682.

ings. It is contended that the second appeal in the High Court has abated so far as the 10th defendant was concerned and that as the 13th defendant also never appealed, the Lower Appellate Court's decree is still enforceable against both of them, and that since their shares in the tarwad cannot be partitioned and separated, the Lower Appellate Court's decree is thus enforceable against the whole tarwad. This argument assumes that 10th and 13th defendants were necessary parties to the second appeal. As I have already said and as the Lower Court has found as a question of fact, it was the tarwads which were opposed to each other in this litigation throughout, it was therefore the tarwads who were the necessary parties to each step of the litigation and the tarwads who were the necessary parties in the second appeal. To that second appeal the plaintiffs' tarwad was a party undoubtedly because every member of it was on record. But it seems to me that the defendants' tarwad was no less on the record as a party, even though two of its minor members were not there because, as pointed out, the karnavan and the manager of the tarwad were on the record.

The plaintiffs' contention, if I understand it aright, is that the fact that they chose to make each member of the tarwad a party to the suit somehow deprived the manager and karnavan of their ordinary character as manager and representative of the tarwad, and that therefore the tarwad cannot be on the record, even though its karnavan is, unless each member is also on the record. I am unable to accept the contention which in effect is that the plaintiff has power to force on the tarwad whatever manner of representation he pleases and prevent them from using any other that is ordinarily open to them. So that in a case like the present, the plaintiff could, by choosing the manner of representation by inclusion of all individual members and by gaining over any single member to his side, effectually burke any proceedings in opposition to his own. Obviously, such a contention is untenable. The only question I have to decide is whether, as a matter of fact, the tarwad was properly represented in that appeal. The karnavan was on record, and he is ordinarily sufficient to represent the tarwad and he does not lose his representative character merely because the plaintiff chooses, from abundant caution, to make all the members parties. I find nothing to indicate that the karnavan had lost his representative character. Clearly, the karnavan is *prima facie* always clothed with a representative as well as an individual character, and I am unable

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to appreciate how it is open to the plaintiff to deprive him of that representative capacity. In that capacity he represents and defends the rights of the whole tarwad and all the members of it as well as his own individual rights. Any decree then, in favour of or against the karnavan was a decree in favour or against the tarwad as a whole.

It has been clearly laid down in *Manakat Velamma* v. *Ibrahim Lebbe* (5) and *Rayarappan Nambiar* v. *Koyotan Chalile Veetil Karnavan*(6), that a decree against the karnavan binds the tarwad if he was sued in his representative capacity and that the decision of the latter question is not so much a question whether he was specifically impleaded as representative of the tarwad, as whether he was as a matter of fact not conducting the litigation for the tarwad, and if it is found, as in this case, that he was, it does not matter if the other members were added or omitted to be added. The decree which the plaintiffs got in the Lower Appellate Court was a decree against the karnavan and therefore against the tarwad. The karnavan and therefore the tarwad appealed and got a decree in his favour and therefore in its favour. That decree enures for the whole tarwad, whether or not all the other members were on the record. Applying the test whether the original suit could have been maintained without bringing the 10th and 13th defendants on record, it appears to me quite clearly that it could. The plaintiff's tarwad is therefore bound by the decree in second appeal.

The plaintiffs have relied specifically on two rulings to controvert this view—*Balaram Pal* v. *Kanyska Majhi* (7) and *Ambika Prasad* v. *Jhinak Singh*(8). The former case, I confess I do not follow, where it is stated "as the plaintiffs pleaded a joint title, the right to sue was one which did not survive to the surviving plaintiff.". I do not see why it might not have survived. But if the Court meant that from the other facts it was apparent that the right to sue did not survive this ruling has no application to the present case. The case *Ambika Prasad* v. *Jhinak Singh* (8) purports to follow this case. But, with respect, I do not see why the decree against a deceased party should be a nullity if the deceased party was properly represented in the decree and therefore all the necessary parties were on the record, and I doubt if that ruling was intended to go so far.

5. (1903) I L R 27 M 375. 6. (1918) 35 M L J 51.
7. (1919) 53 I C 548. 8. (1922) I L R 45 A 286.

In this view of the case I do not think it necessary to consider the application of O. 41, R. 4 and the rulings under that rule; but I agree with the plaintiffs' learned pleader when he contends that that rule can only apply when the fact of the omission of the parties is brought to the notice of the Court and it consciously decides to apply the rule. If the rulings in *Appanna* v. *Gavarappadu*(9) and *Chintaman* v. *Gangabai*(10) imply that O. 41, R. 4 applies even if the Court is ignorant of the absence of the necessary parties, it may be that they go too far. It is not necessary to go into this question further. In the present case, the High Court was not aware when it heard the appeal that the 10th defendant was dead, although it might have been aware, if it had scrutinised the array of parties that the 13th defendant who was a party in the Lower Appellate Court had not been added in the High Court. Nor is it a case for the application of O. 22, and the survival of any right to sue or defend a suit. The whole of the defendants' party was embodied in the karnavan and the right to appeal never abated against him. Thus, no possibility of conflict between the decisions of the Lower Appellate Court in the fisrt appeal and the High Court in the second appeal arises.

On the whole, therefore, I am not prepared to interfere with the order of the Lower Appellate Court and dismiss the appeal with costs.

T. S. V. *Appeal dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE PHILLIPS AND MR. JUSTICE MADHAVAN NAIR.

Muthuswami Chettiar ... *Appellant** (*Petitioner*)

v.

The Official Receiver of North Arcot and another ... *Respondents* (*Respondents*)

Provincial Insolvency Act (V of 1920), Ss. 50, 53 and 80—Mortgagee—Name entered in schedule of creditors—Application by another creditor to treat mortgage as nominal—Official Receiver—Powers of—Order if amounts to rejection of proof of debt—Procedure.

After a mortgagee's name had been entered in an insolvent's schedule of creditors, another creditor put in an application before the Official Receiver under S. 53 of the Provincial Insolvency Act asking that the mortgage should be treated as a nominal transaction unsupported by consideration. The Official Receiver held an inquiry and directed that the mortgage debt should not be in cluded in the schedule. *Held,* the application being substantially one to declare the mortgage void against the Official Receiver under S. 53, it could be

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*A. A. O. No. 527 of 1924. 9th March, 1926.

9. (1924) 48 M L J 601.

10. (1903) I L R 27 B 284.

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enquired into by the Insolvency Court alone and not by the Official Receiver. Nor could the order be deemed to be one rejecting a proof of a creditor within the meaning of S. 80, as the mortgagee in no sense tendered proof of his debt. The Act nowhere gives power to the Official Receiver to expunge a debt entered in the schedule of the insolvent, his only power being to move the Court under S. 50 to expunge entries improperly made in the schedule.

Appeal against the order of the District Court of North Arcot dated 21st March, 1924 in C. M. P. No. 374 of 1923 in I. P. No. 17 of 1920 (presented against the order of the Court of the Official Receiver, North Arcot, dated 19th July, 1923 in M. P. No. 45 of 1921 in I. P. No. 1 of 1921).

K. Rajah Aiyar for appellant.

A. Viswanatha Aiyar and *A. Ramaswami Aiyar* for respondents.

The Court delivered the following

JUDGMENT :—In this case the appellant's name was included in the insolvent's schedule of creditors. Another creditor put in an application before the Official Receiver under S. 53 of the Provincial Insolvency Act asking that the mortgage in favour of the appellant should be treated as a nominal transaction unsupported by consideration. The Official Receiver held an enquiry and passed an order that the appellant's debt would not be included in the schedule. The appellant appealed under S. 68 to the District Court, where objection was taken as to the jurisdiction of the Receiver. The objection was overruled. On the merits the District Judge confirmed the order of the Official Receiver. Objection is again taken in this Court to the jurisdiction of the Receiver to pass any order in the matter and reliance is placed on *Appireddi* v. *Appireddi* (1). The facts of that case are not the same as those of the present one but the principle would appear to be applicable here. What the petitioning creditor wanted was an adjudication that the mortgage deed in appellant's favour was not a binding transaction, and as stated in the petition, it was substantially an application to declare the instrument void as against the Receiver under S. 53. It has always been held that such applications are to be decided by the Court and not by the Receiver as against whom the instrument is sought to be declared void, as this would in effect make the Official Receiver the Judge in his own case.

It is, however, contended for the respondents that an application under S. 53 is unnecessary, as the Receiver was merely exercising the powers given to him under S. 80 (*b*) to frame a schedule and to admit or reject proofs of credits.

1. (1921) I L R 45 M 189 · 41 M L J 606.

So far as the framing of schedules is concerned, the matter need not be discussed, but such schedules of debts can only be framed after the admission or rejection of proofs. We must, therefore, consider whether in this case the Receiver can be deemed to have rejected proof of the creditor within the meaning of S. 80. S. 33 is the section applicable to proof of debts and that lays down that when an order of adjudication has been made, all persons alleging themselves to be creditors of the insolvent shall tender proof of their respective debts by producing evidence. The appellant here did not allege that he was a creditor but merely put in a counter to a petition wherein the allegation was made that the mortgage in his favour was a void transaction. This can in no sense be termed tendering proof of his debt. If the Receiver was exercising his power of framing a schedule, that is to say, altering and amending the schedule filed by the debtor, which is the main schedule in insolvency proceedings, S. 50 is applicable which lays down that where the Receiver thinks that a debt has been improperly entered in the schedule, the Court may, on an application of the Receiver, expunge such entry. Cl. (2) gives power to the Court to do so in certain cases on the application of the creditor or of the debtor. Nowhere is the power given to the Receiver to expunge a debt entered in the schedule of the insolvent. The order made by the Receiver is, therefore, wholly without jurisdiction.

The case relied on by the respondents in *Dronadula Sriramulu* v. *Ponakavira Reddi* (2) has really no bearing on this question. That case was concerned with the question of the jurisdiction of the Insolvency Court in transactions which do not come within Ss. 53 and 54, and that has nothing to do with the present case, in which a transaction which does come within S. 53 is concerned. It will of course be open to the Receiver to take action under S. 53 if so advised, or, if he thinks it is the better course, to ask for the expunging of the debt, though what effect that would have on the transaction so far as the appellant is concerned, is not clear and need not be discussed.

The appeal is allowed and the order of the District Judge is set aside with costs throughout.

T. S. V. *Appeal allowed.*

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2. (1923) 45 M L J 105.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE PHILLIPS AND MR. JUSTICE MADHAVAN NAIR.

T. Kaliyappa Mudaliar ... *Petitioner** (*1st defendant*)

v.

Minor Kumaraswami Mudali by next friend Poongavanammal ... *Respondent* (*Plaintiff*).

Kaliyappa Mudaliar *v.* Kumaraswami Mudali.

Civil Procedure Code, O. 9, R. 13 and O. 3, R. 1—Defendant present on date of hearing—Pleader asking for adjournment—Refusal of—"No instructions" reported—Decree against defendant—Setting aside of—Procedure.

On the day to which a case had been posted for hearing, the defendant and his pleader were present in Court, but not his witnesses. The pleader applied for an adjournment, and the same being refused he reported he had no instructions. The suit was decreed against the defendant. *Held*, as the mere physical appearance of the defendant did not constitute an "appearance" within the meaning of O. 3, R. 1, Civil Procedure Code, which contemplates only an appearance with the intention of pleading in a suit, he must be deemed to have been *ex parte* and an application to set aside the *ex parte* decree was competent. *Gopala Row* v. *Maria Susaya Pillai*, (1906) I L R 30 M 274 followed.

Petition under S. 115 of Act V of 1908 praying the High Court to revise the order of the District Court of North Arcot at Vellore dated 1st April, 1924 in C. M. A. No. 18 of 1924 preferred against the order of the Court of the Subordinate Judge of Vellore dated 27th February, 1924 in C. M. P. No. 758 of 1923 in O. S. No. 11 of 1921.

K. Rajah Aiyar for petitioner.

C. V. Anantakrishna Aiyar for respondent.

The Court (Mr. Justice Wallace) made the following order for a Bench :—

JUDGMENT :—This Civil Revision Petition is against the decision of the District Court, North Arcot, in the following circumstances. The petitioner is the 1st defendant in O. S. No. 11 of 1921 in the Sub-Court of Vellore. On 24th November, 1923 the suit was posted for hearing and his witnesses were absent. His pleader applied for an adjournment and was refused. Then the pleader said he had no instructions. The 1st defendant himself was present. The suit was decreed against him. He applied to the Sub-Court to vacate that decree and the Sub-Court ordered that the suit would be restored on condition that the appellant paid into Court the amount of the decree and costs. On appeal the District Court held that the Sub-Court had no jurisdiction to restore the suit as it was really decreed under O. 17, R. 3, Civil

*C R P No. 510 of 1924. 18th March, 1926.

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Procedure Code, and that the proper remedy of the appellant was to appeal on the merits, which he had not done. The District Court declined to interfere with the order and the appellant-petitioner now files this Civil Revision Petition.

The point for decision is, when a party's pleader reports no instructions and the party himself is personally present, is a dismissal of the suit or a decree *ex parte* for default of appearance under O. 17, R. 2 or does the case come under O. 17, R. 3 of the Code? It appears to me that when a party is himself present and has not done something which he was required to do, namely, produce his witnesses, the order is under O. 17, R. 3 and not an order for default of appearance.

It is argued however that, since the party was represented by his pleader, the party, when his pleader withdrew from the case, cannot *for that hearing* be held to have been present in law, although he was present in person, the argument being that he was not prepared to go on with the case himself. I am not able to appreciate this distinction. If it were open to a party to whom time was granted and who has failed to produce his evidence, when his pleader retires from the case, because an adjournment is refused, to plead that he is not ready to conduct his case and therefore any dismissal of the suit must be one for default of appearance, it is difficult to say to what kind of default O. 17, R. 3 applies. The party, when taxed with failure to perform any of the duties enumerated in O. 17, R. 3 could always put up his pleader to retire from the case, and then himself plead that he could not conduct it. My view therefore is that if a party's pleader, on the party's own instructions given in Court in person, retires from the case, the party must himself carry on the case. It cannot be within the option of the party to decide whether or not he is putting in an appearance which is an appearance in law.

In another case which I have lately heard, C. M. P. No. 3591 of 1923, Mr. Jayarama Aiyar sought to support the present argument by a reference to a foot-note to the Civil Rules of Practice, No. 276, quoting the proceedings of the High Court, dated 15th March, 1821, which runs :

> "A party who has retained a vakil to appear for him cannot be heard in person unless he has withdrawn the vakalatnama."

Mr. Varadachariar who appeared on the other side was able to trace this ancient rule to its source, and pointed out that it was framed under S. 22 of Regulation XIV of 1816 which is directed towards ensuring that a vakil will only undertake a case on a vakalat and that if he has signed a vakalat to one

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of the parties he cannot accept a brief for the other party. Section 13 of the same Regulation permits a party to appear in person and plead his case if his pleader is unable to attend. This makes it evident that the rule was not meant to preclude a party from appearing and pleading his own case when his pleader was unable to do so, except on the condition that he first withdrew the vakalat. When then a party's pleader is merely absent, the party when present can conduct his own case in Court and mere absence of a party's pleader will not of itself constitute absence of the party when the party is in fact present in Court. As to whether a similar inference should be drawn when the pleader, with the party at his elbow, merely reports no instructions, there are no doubt two reported cases to the contrary, namely, *Gopala Row* v *Maria Susaya Pillai* (1) and *Mahant Damodar Das* v. *Raj Kumar Das* (2). In both of these cases it was held that where a pleader appeared and was refused adjournment and then declined to proceed with the suit and it was dismissed, it was a dismissal for default, even though the plaintiff himself was personally present. The argument is that the party was appearing not in his own capacity but by his pleader, and therefore when the pleader declined to proceed the party failed to appear as from that time. For my part I find it very difficult to resist the inference that when a party is present instructing his pleader to report no instructions the party is thereby taking upon himself the conduct of his own case and cannot be heard to say that he is not. The case reported in *Pichamma* v. *Sreetamulu* (3) does not help. In that case neither the party nor his pleader was present. Nor does the case in *Manickam Pillai* v. *Bathummal* (4) and the Privy Council case quoted therein, *Radha Kishan* v. *The Collector of Jaunpur* (5). In the case in *Shivdayal Ramcharan* v. *Khetu Gangu* (6) both the pleader and the party were absent and the Court, after remarking that the pleader was not present by virtue of his having delegated his powers to another pleader to whom he could not delegate them, went on to remark, "As the defendant was not himself present the decree passed against him was an *ex parte* one." This seems to imply that if the defendant had been present in person the decree would not have been *ex parte*. As at present advised

1. (1906) I L R 30 M 274: 17 M L J 225.
2. (1921) I L R 1 Pat 188.
3. (1917) I L R 41 M 286: 34 M L J 24 (F B).
4. (1924) I L R 47 M 819: 48 M L J 152 (F B).
5. (1900) I L R 23 A 220: 11 M L J 65 (P C).
6. (1895) I L R 20 B 295.

Kaliyappa Mudaliar v. Kumaraswami Mudali.

I am not prepared to hold that a party, who appears in person when his pleader is absent or on the instruction of the party reports no instructions, has not put in an appearance in the case. I think, however, in view of the ruling in *Gopala Row* v. *Maria Susaya Pillai* (1) and *Mahant Damodar Das* v. *Raj Kumar Das* (2) quoted above that it is advisable that the point should be put before a Bench, which may, if it thinks fit, refer it to a Full Bench for a definite ruling, and I order accordingly.

This petition coming on for final hearing this day, the Court delivered the following

Phillips, J.

JUDGMENT :—*Phillips, J.* :—Mr. Justice Wallace has referred a point for the decision of a Bench, namely, whether a party when he appeared by a pleader who after an application for adjournment has been refused, reports no instructions is to be deemed *ex parte* or whether he if personally present in Court at the time must be deemed to have "appeared" in the case. Wallace, J.'s order by inadvertence purports to refer the above question alone for our decision, but we must take it that the Civil Revision Petition itself has been referred for disposal.

The question at issue was decided in *Gopala Row* v. *Maria Susaya Pillai* (1) by a Bench of this Court, where it was held that a plaintiff fails to appear within the meaning of S. 102, Civil Procedure Code, when his pleader declines to proceed with the suit. It makes no difference that the party himself was present in Court. This case actually determines the point before us, and there has been no reported decision to the contrary since the date of this case, *i. e.*, 1907. That decision has also been followed in *Mahant Damodar Das* v. *Raj Kumar Das* (2), *Lalji Sahu* v. *Lachmi Narain Singh* (7), *Prabhu* v. *Dwarka Prasad* (8) and *Ramdhan Tewari* v. *Bishun Progash Narain Singh* (9). In one of those judgments a statement is made that the Calcutta High Court takes the same view, but possibly this refers to an unreported case, for, no reported decision of the Calcutta Court has been cited before us. A different view is taken in *Soonderlal* v. *Goor Prasad* (10) but only as an *obiter dictum*. On the facts of that case the decree was held to have been passed *ex parte*.

1. (1906) I L R 30 M 274: 17 M L J 225.
2. (1921) I L R 1 Pat 188.
7. (1918) 3 P L J 355.
8 (1918) 4 P L J 152.
9. (1919) 5 P L J 17.
10. (1898) I L R 23 B 414.

Kaliyappa Mudaliar v. Kumaraswami Mudali.

Phillips, J.

The other case cited, *Ismail Ebrahim* v. *Haji Jan Mahomed* (11), does not seem to be really in point. We have therefore the decision of this High Court followed by practically all the Judges of the Patna High Court, and there does not appear to be any good reason why we should not follow the same. As the correctness of the decision is questioned in Wallace, J.'s reference we think it advisable to add our own reasons.

The real question for determination at issue is whether the appearance mentioned in O. 3, R. 1 is merely a physical appearance, or whether it must be an appearance with the intention of pleading in a suit. It is argued for respondents that mere physical appearance is sufficient, but if this is so it would be an appearance if a party happened to be anywhere on the Court precincts with or without the knowledge of the Court. It is therefore rather difficult to accept the argument that mere personal appearance is sufficient. It is clearly, we think, intended that the appearance must be, not as a man, but as a party and with the intention of acting as such party in that suit. If this is correct, then the mere fact that the party was present in Court when his pleader reported no instructions would not amount to an appearance, for he is merely there as the person who was represented by his pleader. The pleader acted on his behalf and when he ceased to do so, the party took no further part in the proceedings. The mere fact that he was in Court cannot make it an appearance in the suit. We must therefore hold that in the present case there was no appearance by the defendants and that the application to set aside the order as passed *ex parte* was competent.

On this application the Subordinate Judge has passed the following order : "Without any expression of opinion on the merits of the application and the provision of law under which it is sought to be put in, I propose to set aside the decree on petitioner's depositing into Court the amount of decree and costs up to this day within one month from this date." The appellant appealed against this order to the District Judge who was inclined to hold that no appeal lay, but that, if an appeal lay, the Subordinate Judge was entirely competent to deal with the matter because he had the conduct of the suit throughout and therefore the District Judge refused to interfere with a matter which was fully within the discretion of the Subordinate Judge. This would be quite right if the Subordinate Judge had exercised any judicial discretion at all, but in the present

11. (1908) I L R 33 Bom 475.

case he has entirely refused to form an opinion on the merits of the case, *i. e.*, he omitted to determine under O. 9, R. 13 either that summons was not duly served or that the appellant was prevented by any sufficient cause from appearing when the suit was called on for hearing. Until that point was decided the Subordinate Judge had no power to set aside the decree on terms or otherwise. It is therefore an order passed without a finding on the point necessary to be determined before such an order could be passed against the respondent. Consequently the District Judge's order leaving the whole matter to the Subordinate Judge's discretion cannot be upheld, for, that discretion, if it can be so called, was exercised in an arbitrary manner. The petition will have to be remanded to the Subordinate Judge for fresh disposal in the light of the above. Costs here will abide the result and be provided for in that Court's order.

T.S.V. — *Petition remanded.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE PHILLIPS AND MR. JUSTICE ODGERS.

M. L. M. Ramanathan Chetti ... *Petitioner* (2nd appellant in Appeal No. 99 of 1922 on the file of the High Court)*

v.

V. K. N. S. P. Subramanian Chetti and others ... *Respondents (Respondents and 1st appellant).*

Civil Procedure Code, S. 110—Appeal against decree dismissed—No question of law involved—Memorandum of objections allowed to the extent of Rs. 300—Only one decree drawn up—Decree if one of affirmance or variation—Leave to appeal to Privy Council.

An appeal involving a pure question of fact was dismissed by the High Court, but a memorandum of objections filed by the respondent was allowed to the extent of about Rs 300. Under the practice prevailing in the Madras High Court only one decree was drafted, incorporating the dismissal of the appeal and modifying the decree to the extent allowed on the memorandum of objections. The appellant claimed leave to appeal to the Privy Council on the ground that the decree on appeal was not one of affirmance and hence he was entitled to leave as a matter of right. *Held,* the memorandum of objections is really in the nature of a cross-appeal, and the decree passed by the High Court being one of affirmance so far as the appeal was concerned, no leave to appeal could be granted under S. 110, Civil Procedure Code. *Chiranji Lal* v. *Behari Lal,* (1918) 16 A L J 864, followed; *Annapurna Bai* v. *Rup Rao,* (1924) I L R 51 C 969 (P C); *Raja Sree Nath Roy Bahadur* v. *The Secretary of State for India in Council,* (1904) 8 C W N 294; *Mulraju Lakshmi Venkayamma Rao Bahadur* v. *Venkatadri Appa Rao,* (1915) 30 I C 372 referred to.

*C M P No. 1517 of 1926. 30th April, 1926.

Ramanathan Chetti v. Subramanian Chetti.

Petition presented under Ss. 109 and 110 and O. 45, Rr. 2, 3 and 8 of the Code of Civil Procedure, 1908, praying that in the circumstances stated therein, the High Court will be pleased to grant a certificate to enable the petitioner to appeal to His Majesty in Council against the judgment and decree, dated 20th November, 1925 in Appeal No. 99 of 1922 preferred to the High Court against the decree of the Court of the Additional Subordinate Judge of Ramnad at Madura in O. S. No. 109 of 1915 (O. S. No. 160 of 1915 of the Court of the Subordinate Judge of Ramnad).

C. Padmanabha Aiyangar for petitioner.

K. V. Krishnaswami Aiyar and *T. M. Ramaswami Aiyar* for respondents.

The Court made the following

Phillips, J.

ORDER :—*Phillips, J.* :—The petitioner was the second appellant in Appeal No. 99 of 1922, and he now applies for leave to appeal to His Majesty in Council against the decree of this Court. His appeal was dismissed and the Lower Court's decree confirmed, and it is not suggested that any substantial question of law is involved in the appeal. If, therefore, this appeal stood alone, the petitioner would have no right to appeal to the Privy Council under Ss. 109 and 110 of the Code of Civil Procedure. The petitioner however relies on the fact that a memorandum of objections was filed by the respondents in Appeal No. 99 of 1922 and allowed, and consequently, when the appellate decree was drawn up the Lower Court's decree was modified to the extent of about Rs. 300 in respect of some rent disallowed in the Lower Court.

It is contended for the petitioner that, as the only decree of this Court has modified the decree of the Lower Court, it is not an affirming decree and that therefore an appeal lies to the Privy Council. Respondents 1 and 2 contend that in accordance with the decision in *Raja Sree Nath Roy Bahadur* v. *The Secretary of State for India in Council* (1) which was followed in this Court in *Mulraju Lakshmi Venkayamma Rao Bahadur* v. *Venkatadri Appa Rao* (2), the decree of this Court substantially affirms the decree of the Lower Court and no appeal lies. In these cases it was decided that where a High Court has affirmed the decree of the Court of first instance, though it has made some modifications in the decree as regards another portion of the claim, it is essential for the

1. (1904) 8 C W N 294. 2. (1915) 30 I C 372.
3. (1924) I L R 51 C 969 (P C).

grant of a certificate of leave to the Privy Council that the appeal must involve some substantial question of law. The petitioner relies on the recent decision of the Privy Council reported in *Annapurna Bai* v. *Rup Rao* (3), where it was held that there was a right of appeal in a case where the High Court had modified the decree of the Lower Court by increasing in favour of the appellant the maintenance allowance decreed by the Lower Court, whereas in all other respects the decree was affirmed. In view of this decision it is possible that the two former decisions require reconsideration, but I do not think that any of these cases is directly applicable here. If no memorandum of objections had been filed, admittedly the plaintiff would have no right of appeal. Does the mere fact of an order on the memorandum of objections modifying the decree of the Lower Court give the plaintiff the right to re-open the whole of the case? It was held in *Chiranji Lal* v. *Behari Lal* (4) that when there had been two cross-appeals against the decree of the Court of first instance and one cross-appeal had been allowed and the other dismissed, there was no right of appeal against the decree dismissing the appeal, whereas an appeal lay against the decree allowing the appeal. The Court proceeded on the view that in cross-appeals the decree in each was a separate one. A memorandum of objections is in effect a cross-appeal, and although it is the practice in this Court to draft only one decree with reference to both the main appeal and the memorandum of objections, it is also the practice to do the same in respect of two or more cross-appeals from the same decree. In effect there are two orders of this Court, one dismissing the appeal and affirming the decree of the Lower Court and the other allowing the memorandum of objections or cross-appeal and modifying the decree of the Lower Court. So far, then, as the decree affirming the decree of the Lower Court is concerned, no appeal would lie to the Privy Council. Similarly, no appeal would lie to the Privy Council in respect of the order on the memorandum of objections because the subject-matter of that appeal was only Rs. 300. I would therefore hold that the mere fact that a cross-appeal has been allowed and the Lower Court's decree modified accordingly does not give the right of appeal to the appellant who otherwise would not have that right.

Ramanathan Chetti v. Subramanian Chetti.

Phillips, J.

I therefore dismiss this petition with costs of respondents 1 and 2.

3. (1924) I L R 51 C 969 (P C). 4. (1918) 16 A L J 864.

Ramanathan Chetti v. Subramanian Chetti.

Odgers, J.

Odgers, J. :—The question is whether where an appeal is dismissed, *i. e.*, the decree of the Lower Court is confirmed but on appeal a memorandum of objection is allowed the decree or final order affirms the decision of the Court immediately below the Court passing such decree or final order. The question in appeal was a pure question of fact and the only ground on which the conditions of S. 110, Civil Procedure Code, can be fulfilled is that the decree on appeal is not one of affirmance.

There is no doubt that cross-objections are in the nature of an appeal. They were formerly held to depend in the appeal, *i. e.*, they could not be heard unless the appeal itself was heard; this has been altered by O. 41, R. 22 (4) and the hearing of the memorandum of objections does not depend on the hearing of the appeal but may be heard as a substantive cross-appeal. If this is so, it seems clear that the two things, dismissal of the appeal and allowance of the memorandum of objections are two distinct things and could appropriately be the subject-matter of a separate decree. There is no question hence of appealing against the memorandum of objections. In *Vikrama Deo Garu* v. *Maharaja of Jeypore* (5) my learned brother was of opinion that where a claim for Rs. 15,000 was entirely disallowed by the first Court and allowed only to the extent of Rs. 5,000 by the Appellate Court, the latter could not be said to be a decree of affirmance and in any case the appeal was Rs. 10,000 in value. In *Raja Sree Nath Roy Bahadur* v. *The Secretary of State for India in Council* (1) the Appellate Court allowed the appellant an additional sum of Rs. 7,000 to that allowed by the Lower Court. The appellant sought to appeal to the Privy Council on the ground that the Appellate Court had not confirmed the decree of the Lower Court. It was held in substance that it did and that the appeal was dismissed except as to the additional sum given. In *Bhagwan Singh* v. *The Allahabad Bank, Ltd.* (6) the Appellate Court not only allowed a deduction of Rs. 6,000 on account of a mistake but saddled the applicant with a liability for interest in excess of what the Lower Court had awarded. The decree of the Lower Court was in fact modified to appellant's prejudice by about Rs. 8,000. It refused to follow *Raja Sree Nath Roy Bahadur* v. *The Secretary of State for India in Council* (1) as the decree of the High Court modified that

1. (1904) 8 C W N 294. 5. (1916) M W N 122.
6. (1920) I L R 43 A 220.

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Odgers, J.

of the Lower Court. In *Annapurna Bai* v. *Rup Rao* (3) special leave to appeal was granted from a decree of the High Court which modified the decree of the Lower Court by increasing the rate of maintenance from Rs. 800 to Rs. 1,000 per annum.

I think the present case is clearly distinguishable. The appellate judgment confirmed that of the Lower Court though it in the same decree allowed the cross-appeal by the appellant.

It appears to me that this case is similar to that in *Chiranji Lal* v. *Behari Lal* (4) which was a case of cross-appeals; no certificate being granted in respect of the appeal from the portion of the judgment which affirmed that of the Lower Court. In *Mulraju Lakshmi Venkayamma Rao Bahadur* v. *Venkatadri Appa Rao* (2) a Bench of this Court saw no reason to differ from the decision in *Raja Sree Nath Roy Bahadur* v. *The Secretary of State for India in Council* (1). Whether that decision is correct or not seems to me to be unnecessary to decide in the present case which is really one of cross-appeals similar to *Chiranji Lal* v. *Behari Lal* (4). I think the decree is one of affirmance and that leave to appeal to the Privy Council must be refused.

T. S. V. *Leave to appeal to the Privy Council refused.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE DEVADOSS AND MR. JUSTICE WALLER.

Paramaswami Aiyangar and another ... *Petrs.** (*Respts. Nos.* 1 *and* 2 *in A. A. O. No.* 437 *of* 1923 *and Appts. in A. A. O. No.* 15 *of* 1924 *on the file of the High Court*)

v.

Pichammal *alias* Sriranga Nachiyar now named Alamelu Nachiyar ... *Respt.* (*Appt. in A A O No.* 437 *of* 1923 *and* 1*st respt. in A. A. O. No.* 15 *of* 1924 *on the file of the High Court*).

Paramaswami Aiyangar v. Pichammal.

Civil Procedure Code, Ss. 109, 110—*Order under the Probate and Administration Act—Appeal to the High Court—Decree—If appealable to the Privy Council—Letters Patent (Madras), cl.* 39.

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*C M P No. 379 of 1926 6th May, 1926

1. (1904) 8 C W N 294.
2. (1915) 30 I C 572.
3. (1924) I L R 51 C 969 (P C).
4. (1918) 16 A L J 864.

Paramaswami Aiyangar v. Pichammal.

If a decree or final order of the High Court passed in appeal on a matter arising under the Probate and Administration Act satisfies the conditions laid down in Ss. 109 and 110 of the Civil Procedure Code, an appeal will lie to the Privy Council. The right of appeal conferred by the Civil Procedure Code and cl. 39 of the Letters Patent is not affected by the fact that the Probate and Administration Act provides only for an appeal to the High Court. Case-law discussed.

Petition under Ss. 109, 110 and O. 45, Rr. 2, 3 and 8 of the Code of Civil Procedure praying that in the circumstances stated therein the High Court will be pleased to grant a certificate enabling the petitioners herein to appeal to His Majesty in Council against the decision of the High Court dated 22nd September, 1925 in A A O Nos. 437 of 1923 and 15 of 1924 preferred to the High Court against the decree of the District Court of Madura dated 25th June, 1923 in O S No. 14 of 1919.

S. Varadachari, N. S. Rangaswami Aiyangar, P.V. Marthandan Pillai and *A. Ramamurthi* for petitioners.

M. Patanjali Sastri for respondent.

The Court made the following

ORDER :—This is an application for the grant of leave to appeal to His Majesty in Council against the decree of the High Court in C. M. A. Nos. 437 of 1923 and 15 of 1924. A preliminary objection is taken by Mr. Patanjali Sastri for the respondent that no appeal lies to the Privy Council against the decree of the High Court in testamentary matters and it is incompetent for the High Court to grant leave to appeal to His Majesty in Council. The argument of Mr. Patanjali Sastri is that under the Probate and Administration Act, S. 86, only one appeal is provided from an order of District Judge or District Delegate to the High Court and no further appeal is allowed by the Act, and that an appeal being a creature of statute there is no statute granting the right of appeal to the Privy Council in testamentary matters. S. 86 no doubt provides for an appeal to the High Court against an order made by a District Judge or a District Delegate. The question is, is the decree of the High Court in a testamentary matter appealable to His Majesty in Council, if the case is one which, if it were an ordinary civil case would be appealable under S. 100 of the Code of Civil Procedure. Reliance is placed upon the well-known case in Rangoon, *Botatoung Co., Ltd.* v. *The Collector of Rangoon* (1) for the contention that no appeal lies to the Privy Council. In that case it was held

1. (1912) I L R 40 C 21 : 23 M L J 276 (P C).

Parama-swami Aiyangar v Pichammal

that no appeal lay to the Privy Council in land acquisition cases. Their Lordships observed:

"A special and limited appeal is given by the Land Acquisition Act from the award of 'the Court' to the High Court. No further right of appeal is given. Nor can any such right be implied."

In that case the award was considered to be an award by an arbitrator and the Land Acquisition Act having provided for only one appeal it was held that no second appeal lay to the Privy Council. Their Lordships treated the decision of the Court on reference by the Collector to be an award by arbitrators. The question is whether to a civil case wherein the rights of parties are determined, the Civil Procedure Code does not apply. The case in *Botatoung Co., Ltd.* v. *The Collector of Rangoon* (1) has been explained by their Lordships of the Privy Council in *Ramachandra Rao* v. *Ramachandra Rao* (2). Lord Buckmaster in delivering the judgment of their Lordships observed at page 329:

"The argument which succeeded in that case emphasizes the distinction between an award and a decree, and the judgment mentions this in terms by stating that the appellants, although admitted to the High Court, could not have the right to carry an award made under an arbitration as to the value of land taken for public purposes up to this Board as if it were a decree of the High Court made in the course of its original jurisdiction.......When once the award as to the amount has become final, all questions as to fixing of compensation are then at an end; the duty of the Collector in case of dispute as to the relative rights of the persons together entitled to the money is to place the money under the control of the Court, and the parties then can proceed to litigate in the ordinary way to determine what their right and title to the property may be."

In *Ramachandra Rao* v. *Ramachandra Rao* (2) it was held that a decision with regard to title in arbitration proceedings was *res judicata* between the parties in subsequent proceedings. The explanation is this, so long as the amount of compensation is in question no right or title of the parties is involved; but where the amount awarded as compensation is paid into Court, and two or more persons claim the right to receive the money, there is a civil contest as to the right to the money between the persons before the Court, and any determination by the Court as to the rights of the parties is a determination in a civil case, and the ordinary incidents applicable to a decree in a civil suit concerning property apply to such decision and therefore in land acquisition proceedings, if two persons contest the right to the amount deposited in Court, their title to such money is determined by the Court and that decision is a decision on the merits of the contest as to the title, and

1. (1912) I L R 40 C 21 : 23 M L J 276 (P C).
2. (1922) I L R 45 M 320 · 43 M L J 78 (P C).

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such a decision operates as *res judicata* in a subsequent suit, where the same title is in question. In *Secretary of State for India* v. *Chellikani Rama Rao* (3) the objection that no appeal lay to the Privy Council in a case under the Forest Act was raised. Reliance was placed upon *Botatoung Co., Ltd.* v. *The Collector of Rangoon* (1). in support of the contention. The Privy Council overruled the objection on the ground that there was no civil right in dispute in *Botatoung Co., Ltd.* v. *The Collector of Rangoon* (1). Lord Shaw in delivering the judgment of the Privy Council observed:

"The proceedings were, however, from beginning to end ostensibly and actually arbitration proceedings. In view of the nature of the question to be tried, and the provisions of the particular statute, it was held that there was no right 'to carry an award made in an arbitration as to the value of land' further than to the Courts specifically set up by the statute for the determination of that value."

With reference to the case before them they observed:

"The merits of the present dispute are essentially different in character. The claim was the assertion of a legal right to possession of and property in land; and if the ordinary Courts of the country are seized of a dispute of that character, it would require, in the opinion of the Board, a specific limitation to exclude the ordinary incidents of litigation."

The order passed by this Court is a decree in a contested civil matter and under cl. 39 of the Letters Patent an appeal lies to the Privy Council from any judgment, decree or order of the High Court made on appeal. Cl. 44 empowers the Indian Legislature to alter or modify the Letters Patent. By the Civil Procedure Code an appeal to the Privy Council against an order or decree of the High Court is provided if it fulfils certain conditions. Ss. 109 and 110 of the Civil Procedure Code lay down in what cases an appeal shall lie to the Privy Council. If a decree or a final order of the High Court satisfies the provisions of Ss. 109 and 110, it is difficult to see how an appeal is not competent to His Majesty in Council. The only authority in point is a decision of the Lower Burma Chief Court reported in *Po Kin* v. *Ma Sein Tin* (4). There, the learned Judges following *Botatoung Co., Ltd.* v. *The Collector of Rangoon* (1), held that no appeal lay against an order made under the Probate and Administration Act. Such an objection does not seem to have been taken in any other case, though in several cases against orders under the Probate and Administration Act appeals were presented to the Privy Council. It is urged by Mr. Patanjali Sastri that,

1. (1912) I L R 40 C 21: 25 M L J 276 (P C).
3. (1916) I L R 39 M 617: 31 M L J 324 (P C).
4. (1919) 51 I C 596.

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though this objection is a novel one, yet it is one which, though not taken in other cases, he is entitled to take here.

If the contention of the respondent is to prevail, no appeal to the Privy Council could lie against the orders of the High Court in insolvency matters or orders under the Guardians and Wards Act. In the Provincial Insolvency Act an appeal is provided to the High Court but not an appeal to the Privy Council. It cannot be said that no appeal lies to His Majesty in Council against the order of the High Court made in insolvency proceedings provided Ss. 109 and 110 are satisfied. This point was specifically raised and decided in *Chatrapat Singh Dugar v. Kharag Singh Lachmiram* (5). In that case Jenkins, C. J. observed:

"It is urged that Ss. 46 and 47 of that Act (meaning the Provincial Insolvency Act), if anything, negative this right of appeal. But I do not so read the Insolvency Act. In my opinion, by that Act there was no intention to interfere with any right of appeal to the Privy Council that might otherwise exist, and this is a case which comes clearly within the provisions of the Letters Patent and of S. 109 of the Code. The only question is whether this is a case which can properly be certified to be a fit one for appeal to His Majesty in Council."

S. 47 of the Guardians and Wards Act provides for an appeal to the High Court from an order made by the District Court. The provisions as to appeal in the Guardians and Wards Act are similar to the provisions in the Probate and Administration Act. In a well-known case an appeal was preferred with success against the order of the Madras High Court under the Guardians and Wards Act. We have therefore no hesitation in holding that the objection of the respondent as to the competency of an appeal to the Privy Council is wholly untenable.

On the merits, we hold the case satisfies the provisions of Ss. 109 and 110. We therefore certify that this is a fit case for appeal to His Majesty in Council under S. 109 (*a*), and we grant the leave prayed for.

T. S. V. *Leave to appeal to the Privy Council granted.*

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5. (1915) I L R 40 C 685.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE DEVADOSS AND MR. JUSTICE WALLER.

B. S. Ammani Ammal ... *Appellant**

v.

T. S. Ranganayaki Ammal ... *Respondent.*

Ammani Ammal v. Ranganayaki Ammal.

Easement—Light and air—Easement to—Right of—Interference with—Permanent injunction restraining—Grant of—Conditions.

In a suit for a permanent injunction restraining the defendant from interfering with the right of easement to light and air through three windows on the southern wall and an aperture over the southern wall of the plaintiff's house, *held*, following the principle laid down in the case *Ramanuja Naidu* v. *Apparanji Ammal*, (1911) 1 M W N 251, that the case was a fit one in which the plaintiff ought to be given a permanent injunction restraining the defendant from obstructing the windows and the aperture over the court-yard by raising a wall on his land.

Letters Patent Appeal against a judgment of Mr. Justice Phillips, dated 3rd March, 1925, in C. C. C. A. No. 7 of 1923, preferred to the High Court against a decree of the City Civil Judge, Madras, in O. S. No. 474 of 1921.

T. R. Ramachandra Aiyar for appellant.

T. M. Krishnaswami Aiyar for respondent.

The Court delivered the following

JUDGMENT :—The plaintiff's suit is for a permanent injunction restraining the defendant from interfering with the right of easement to light and air through four openings. The City Civil Judge decreed the plaintiff's suit. On appeal Mr. Justice Phillips has reversed the decree of the City Civil Judge and dismissed the plaintiff's suit. The plaintiff has preferred this Letters Patent Appeal.

The plaintiff's case is that her house, No. 135, Govindappa Naick Street, George Town, has three windows on the southern wall and an aperture over the southern wall through which light and air came into her court-yard. The windows are Nos. 1, 3 and 4 and the aperture is No. 2 and the windows and aperture have been in existence for over 20 years and she has acquired an easement for light and air through them and the defendant, the owner of No. 136, is building flush with the southern wall and thereby threatens to interfere with her easement right.

The defence is that the windows were put up and the aperture came into existence only ten years ago and the plaintiff

*L P A No. 74 of 1925. 20th November, 1925.

has not acquired a right to have free access of light and air to her house through the windows and the aperture. The City Civil Judge after a careful consideration of the evidence and the inspection of the plaintiff's house came to the conclusion that the windows and the aperture had been in existence for more than 20 years and that the plaintiff had acquired a right to have free access of light and air through them.

Mr. Justice Phillips differed from the finding of the City Civil Judge mainly on two grounds :

1. That the roof over the court-yard and the sunshades came into existence within 20 years and the evidence as to its existence in 1887 was disbelieved and that it is difficult to credit the evidence with regard to the windows.

2. The City Civil Judge did not say anything about the character or the trustworthiness of the plaintiff's witnesses and consequently there was nothing to guide him in estimating their evidence.

On the plaintiff's side seven witnesses were examined. P. W. 1 is shipping agent and he deposes that the plaintiff's house was rebuilt in 1887 by Nagarathna Mudali and that the windows existed then. He further deposes that the Mangalore title covering over the court-yard was put up about 30 years ago.

Plaintiff's witness No. 2 who attested the sale-deed in favour of the plaintiff (Ex. A) is the brother of Pappathi Ammal, the vendor to the plaintiff. He deposes that Pappathi Ammal bought the house from Nagarathna Mudali in 1895 under Ex. B, that the windows were in existence at the time of the purchase and the aperture over the court-yard was also in existence and that Pappathi Ammal did not make any alteration to the house.

Plaintiff's witness No. 3 is the son of Pappathi Ammal and he joined in the sale-deed, Ex. A, in favour of the plaintiff. He says that the house was purchased 27 years ago and that, at the time of the purchase, the windows and the aperture over the court-yard were in existence.

Plaintiff's witness No. 4 lives in 134, Govindappa Naick Street, and he speaks to the existence of the windows and the aperture for over 20 years.

Plaintiff's witness No. 5 is a landlord and he has seen the house for over 20 or 25 years and says that the windows have always been there.

Plaintiff's witness No. 6 is Mr. Barker who was examined to prove the plan of the house says that the covering over the

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court-yard is 25 or 30 years old, and that the openings, meaning the windows, are 25 to 30 years old.

Plaintiff's witness No. 7 is an auditor in the Postal Audit Office on a pay of Rs. 120. He says that for the last 25 years he has been living in No. 2, Srinivasa Aiyar Street, and that he knows No. 135, Govindappa Naick Street. He is about 41 years of age and says that from his 15th year he has been seeing the windows and the sun-shade over them.

All these are respectable witnesses and they are not shown to be interested in any way in the plaintiff. Mr. Barker's evidence shows clearly that the windows are 25 to 30 years old and that the roof over the court-yard is also 25 to 30 years old.

In order to meet the evidence on the plaintiff's side the defendants have examined six witnesses. Defendant's witness No. 1 is a timber merchant. He says that he was a dubash of Messrs. Dymes & Co., from 1905 to 1912 and the Quilon Tile Works asked Messrs. Dymes & Co. to act as their agents in 1906 and before 1906 the Quilon Tile Works had no agency in Madras and the tiles which are on the covering over the court-yard are Quilon tiles and he wants the Court to draw the inference that the Quilon tiles were not brought to Madras before 1904. Mr. Justice Phillips relies upon his evidence and he remarks "no attempt was made by the plaintiff to discredit this evidence until the case had been closed, when she asked for the issue of a commission to Quilon which was refused."

The City Civil Judge thought that it was unnecessary to issue a commission to ascertain whether Quilon tiles were sent to Madras before 1904. The evidence of D. W. No. 1 is not supported by any record. If the defendants wanted to prove satisfactorily that no Quilon tiles were sent to Madras before 1904, they should have summoned the Bombay Co. for the production of the records of Messrs. Dymes & Co. Defendant witness No. 1's evidence even if true cannot be held to prove that no Quilon tiles were brought to Madras before 1906. The plaintiff could not have anticipated D. W. No. 1's evidence and could not have asked for a commission before his evidence was actually taken and, therefore, no reliance can be placed upon the fact that the plaintiff did not ask for a commission in time to rebut the statement of D.W.No. 1.

Defendant's witness No. 2 is a practising Engineer. His evidence is, that the sunshades were put up after the windows

were built in the wall. He does not give any definite evidence and his statement that the tiled covering over the court-yard is about 15 years old is not supported by any valid reason.

Defendant's witness No. 3 sold No. 136 to the defendants. She says that the windows "were introduced after Ranganatham Pillai purchased it." Ranganatham Pillai was married 14 years ago and about that time these windows were put up and that the Mangalore tiled roof over the court-yard was put up after the plaintiff purchased the house in 1912. This evidence is on the face of it false, for D. W. No. 4 says that at the time of the marriage and before it (meaning Ranganatham's marriage) the windows were in existence and he does not know for how long they were in existence and he is unable to say whether any alterations were made at the time of the marriage of Ranganatham Pillai. It is difficult to see why any new windows should have been placed in the southern wall of the house at the time of the marriage. On the other hand, there was no reason why the windows could not have been opened in the southern wall of plaintiff's house at the time when it was rebuilt by Nagarathna Mudali. In this part of the country, when houses are built, every attempt is made to get as much light and air from the southern side of the house; for, the southern breeze is required to cool the house during summer months, and therefore there was no reason why windows should not have been built in the southern wall of the house at the time when the house was rebuilt. Defendant's witness No. 5 says that portions of the house were built at the time of Ranganatham Pillai's marriage and that the owner of No. 136 objected to the putting up of the windows then. If the owner of No. 136 objected to the putting up of the windows more satisfactory evidence than that of D. W. No. 5 would be forthcoming. Defendant's witness No. 3 does not say she objected to the windows being opened overlooking her house.

The evidence of D. W. No. 6 shows that repairs to that house were effected at the time of Ranganatham's marriage. The evidence of the defence witnesses is not only not satisfactory but is also inconclusive. On the other hand there is the direct evidence of the plaintiff's witnesses who speak to the existence of the windows for over 25 years. If the windows were placed in the wall after the house was built, it would be easy of proof; and the defendants have not attempted to prove by any satisfactory evidence that the windows were placed in the wall after the house was built. On the other

hand, as already observed, there was no reason why Nagarathna Mudali, when he built the house, should not have placed the windows on the southern wall. That the windows are necessary for the convenient enjoyment of the plaintiff's house is not seriously disputed. One window is in the landing of the room in which the staircase is placed and without that window the room would be very dark and the other windows are also necessary for the convenient enjoyment of the house. That being so, it is very difficult to believe that Nagarathna Mudali who re-built the house at a considerable expense did not place any windows in the southern wall of his house. The probabilities are, that the windows were placed at the time when the wall was built, and the evidence of Mr. Barker which has not been seriously challenged makes it clear that the windows have been in existence for more than 25 years or 30 years.

The main contention of the defendants is that the tiled roof was put up recently and that the plaintiff has not acquired an easement in respect of No. 2. The defendants state in the written statement that the windows and the roof were put up only 10 years ago. Defendant's witness No. 4 says that the windows were in existence at the time of Ranganatham's marriage. If the tiled roof was built only 10 or 12 years ago, the defendant could easily have proved it by the production of the plans submitted to the Corporation at the time when the plaintiff applied for permission to put up a tiled roof over the court-yard and shown conclusively that the tiled roof was only put up in 1912. The defendant has not attempted to prove anything of the kind. If the windows were put up within 20 years, the plans submitted to the Corporation at the time the windows were put up would prove the defendant's case. We hold that the tiled roof was put up more than 20 years ago.

Taking all the circumstances into consideration, we have no hesitation in coming to the conclusion that the three windows and the aperture over the court-yard have been in existence for more than 20 years and the plaintiff has acquired a right to light and air through the windows and the aperture.

The next question is, whether the plaintiff is entitled to a permanent injunction. Mr. T. M. Krishnaswami Aiyar contended that this is not a case in which permanent injunction ought to be granted restraining the defendant from putting up a wall on his own land. The windows are necessary for the convenient enjoyment of the plaintiff's house. If the windows are blocked up, the plaintiff's house would become almost

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uninhabitable and the aperture over the court-yard is necessary for the purpose of light and air coming into the plaintiff's *kudam*. The plaintiff is not bound to remove the tiled covering over the court-yard in order to help the defendant to put up a high wall close to it. Even if there was no covering over the court-yard, the defendant's wall raised as high as 20 feet would materially affect the quantity of light and air that would come into the plaintiff's house. As already observed the existence of windows and openings on the southern wall of a house is necessary for the comfort of the inhabitants of the house; for, the southern breeze is very much valued in this part of the country.

We, therefore, hold following the principle laid down in *Ramanuja Naidu* v. *Apparanji Ammal* (1) that this is a fit case in which the plaintiff ought to be given a permanent injunction restraining the defendant from obstructing the windows and the aperture over the court-yard by raising a wall on his land. In the result the appeal is allowed, the decree of the learned Judge is set aside and that of the City Civil Judge is restored with costs throughout.

A. S. V. *Appeal allowed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE PHILLIPS AND MR. JUSTICE ODGERS.

M. S. Subramania Aiyar and others ... *Appellants** (*Petitioners* 8, 4, 5 *and* 6 *and 3rd respondent*)

v.

The Collector of Tanjore ... *Respondent* (*1st respondent*).

Subramania Aiyar v. The Collector of Tanjore.

Land Acquisition Act, S. 28—Interest—Award of—Obligatory or discretionary—Interest when will be awarded.

Quaere: Whether the Court is bound to award interest under S. 28 of the Land Acquisition Act?

Where the claimants did not put forward any extravagant claims, and the claims which were put forward by them were allowed to a considerable extent, *held*, that the claimants were entitled to interest at 6 per cent. from the date of taking possession of the land up to the date of payment.

Appeal against the order dated 3rd December, 1923 of the District Court of West Tanjore at Tanjore in O. P. No. 170 of 1922.

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*Appeal No. 301 of 1924. 3rd November, 1925.

1. (1911) 21 M L J 313.

Subramania Aiyar v. The Collector of Tanjore.

K. S. Sankara Aiyar for appellants.

The Government Pleader for respondent.

The Court delivered the following

JUDGMENT :—Two points have been raised in this appeal: (1) that interest at 6 per cent. should have been awarded under S. 28 of the Land Acquisition Act, and (2) that compensation for Survey No. 791 should have been fixed at Rs. 16-8-0 per cent instead of Rs. 15.

As regards the first point we have been referred to the case in *Rangaswami Chetty* v *The Collector of Coimbatore* (1) in which it was stated that the claimants were entitled to interest at 6 per cent. per annum and also to a judgment of the Privy Council in *Narsingh Das* v. *Secretary of State for India* (2), where at the very end of the judgment, their Lordships state:

"A small matter of the judgment was the omission of the right to interest to which the appellant is entitled at the rate of 6 per cent....."

In neither of these cases is the question whether the Court is bound to award interest under S. 28 discussed and that point is not altogether free from doubt. However, in the present case it appears that the claimants did not put forward any extravagant claims but claims which were allowed to a considerable extent. This being so, we think, to use the words in *Rangaswami Chetty* v. *The Collector of Coimbatore* (1) that they were entitled to interest at 6 per cent., but in coming to this conclusion we must not be held to express any opinion as to whether S. 28 is mandatory or not. The claim to interest will be allowed on the merits of the case from the date of taking possession of the land, namely, 9th March, 1922, to the date of payment.

As regards the second point, it appears that the question has not been dealt with by the District Judge and possibly this may be due to the fact that the original claim in respect of Survey No. 791 was put in by Abhirami Ammal who was not one of the claimants in the District Court. The award in respect of this land and a number of other lands has been made jointly in the names of Abhirami Ammal, her sister and three reversioners and the objection was raised in the District Court by the reversioners. As they are interested in the compensation, the question could be raised by them and we must enhance the rate awarded as it is admitted that Survey

1. (1909) 7 M L T 78.

2. (1924) L R 52 I A 133: 48 M L J 386 (P C).

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No. 791 stands in the same category as the other lands for which Rs. 16-8-0 per cent was awarded.

The appeal is, therefore, allowed with costs and the Lower Court's order modified accordingly.

Under S. 82 we fix the time for performance as one month from this date.

A. S. V. *Appeal allowed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—SIR VICTOR MURRAY COUTTS TROTTER, *Kt., Chief Justice.*

Pootheri Illath Kuttikrishnan Nair,
Proprietor, Malabar Tile Works. . . *Petitioner** (*1st Deft.*)

v.

Kallil Appa Nair and another . . . *Respondents* (*Plaintiff and 2nd defendant*).

Kuttikrishnan Nair v. Kallil Appa Nair.

Indian Contract Act, S. 233—Scope of—Suit against principal and agent—Liability—Nature of—If joint—Decree against both— If valid.

The liability of a principal and his agent is not joint but alternative. *Morel Bros. and Co., Ltd.* v. *The Earl of Westmorland,* (1904) A C 11 followed.

S. 233 of the Indian Contract Act only means that a person dealing with a principal through his agent may at his election sue either or he may sue both of them alternatively in a case where he is not sure whom his exact remedy is against, but he cannot get judgment against both of them jointly, as that would turn a liability which is clearly mutually exclusive into a joint liability.

Petition under S. 25 of Act IX of 1887 praying the High Court to revise the decree of the Court of the Additional District Munsif of Calicut in S. C. S. No. 435 of 1923.

K. Krishna Menon for petitioner.

O. T. Govindan Nambiar for respondents.

The Court delivered the following

JUDGMENT :—In this case a point of some little interest arises because the plaintiff on a contract for supply of timber sued two defendants, the first of whom he alleged to be the principal and the second he alleged carried the transaction through. What the learned Judge has done is to give judgment against both of them. In my opinion that cannot be done. The liability of principal and agent is not joint but alternative—see *Morel Bros. and Co., Ltd.* v. *The Earl of Westmorland* (1) which really confirms the very careful

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*C R P No. 820 of 1924. 22nd March, 1926.

1. (1904) A C 11.

Kuttikrishnan Nair v. Kallil Appa Nair.

examination of the subject in the judgment of the Master of the Rolls in the Court below. Now it is said that the English Law has been altered by S. 233 of the Indian Contract Act together with its illustration. The section runs:

"In cases where the agent is personally liable, a person dealing with him may hold either him or his principal, or both of them, liable"

and then the illustration is,

"*A* enters into a contract with *B* to sell him 100 bales of cotton and afterwards discovers that *B* was acting as agent for *C*. *A* may sue either *B* or *C*, or both, for the price of the cotton."

In my opinion the wording of that section is very unfortunate because it gives rise to the argument and doubt as to whether it was not intended in cases of principal and agent to create by this section a joint liability in the action and that the section must be construed as meaning that he may get judgment against both of them on one and the same transaction. In my opinion that is so utterly contrary to all accepted principles of law that it cannot be right and I have come to the conclusion that what the section means is that the person dealing with the principal through the agent may at his election sue either or he may sue both of them alternatively in a case where he is not sure whom his exact remedy is against; but I am quite clear on this point that the section can only be construed as meaning that he may sue both principal and agent in the alternative and that he cannot get judgment against both of them jointly for the amount sued for. That would be to turn a liability which is clearly mutually exclusive into a joint liability, and, as pointed out by the House of Lords, the liability of an agent and principal cannot be joint. The whole conception of the law of principal and agent excludes all idea of joint liability. The plaintiff in this case has elected, if he is forced to his alternative, to keep his judgment against the principal and let that against the agent go. There was evidence on which the learned Judge could find that the principal was liable in this case and the result will be that the decree will be modified by striking out that part which inflicts liability upon the agent and retaining that part of it which inflicts liability on the principal. It is quite true that the person who complains is the principal and the principal only and that he has failed; but I shall not give any costs in this Court because I think that the creditor invited this appeal by taking judgment against both principal and agent. So this Civil Revision Petition is dismissed without costs.

T. S. V. *Decree modified.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE PHILLIPS AND MR. JUSTICE RAMESAM.

Rama Aiyar and others ... *Appellants** (*Plaintiffs*)

v.

Narayanaswami Aiyar and others ... *Respondents* (*Defts.* 1 *to* 17 *and* 19 *and* 20).

Rama Aiyar *v.* Narayanaswami Aiyar.

Hindu Law—Widow—Alienations by, in favour of eldest sons of her daughters—Binding character of, as family arrangements and as a surrender—Conditions—Suit to impeach transactions brought by one of her daughters in her personal capacity—Withdrawal of—If a bar to suit by her sons on opening of reversion after her death—Transfer of Property Act, S. 51—Bona fides—*Test of—Election under section with person evicting or with transferee.*

A, a Hindu, died leaving a widow and two daughters, *T* and *L*. While in possession of her husband's estate as his heir, the widow executed four documents (Exs. III, IV, V and VI). By Ex. III she purported to sell her house to her eldest grandson by *T*. By Ex. V she conveyed lands in one village and some moveables to him. By Ex. VI she gave away a portion of the lands in another village to the same person. By Ex. IV she gave away the other portion of the lands in that village to her eldest grandson by *L*.

The widow died shortly after in 1868-70. *T*, the elder daughter, died in 1902, and, after her death, *L* filed a suit to recover the properties conveyed to the eldest son of *T* by Exs. III, V and VI and afterwards alienated by him and by his brother, Ex. V, to the predecessors-in-title of the defendants in the suit out of which the appeal arose under Exs. XIV and XV in 1884. *L's* suit was based on allegations which were obviously untenable and was consequently withdrawn by her.

L died in 1918, leaving the five plaintiffs, her sons, surviving her. All the sons of *T* had died before 1918 without issue. The suit out of which the appeal arose was instituted by the five sons of *L* to recover the properties conveyed under Exs. III, V and VI.

The questions for decision were—1. Whether the suit was barred by the withdrawal of *L's* suit referred to above; 2. Whether the transactions evidenced by Exs. III, V and VI amounted to a surrender by the widow of *A* accelerating the reversion; 3. Whether they amounted to a *bona fide* family arrangement binding upon all the parties and also estopped the plaintiffs.

It appeared that the 1st plaintiff attested the sale deeds Exs. XIV and XV; that he asserted his right to the lands covered by Ex. IV in a claim petition in 1905 in execution of the decree in a suit by his mother, *L*; and that there was a partition of the properties given by Ex. IV between the plaintiffs. The 1st plaintiff was a minor at the date of the suit transactions. The other plaintiff were not even born then. They were not parties to the claim petition by the 1st plaintiff and they did not attest Exs. XIV and XV.

Held, reversing the Court below, that the plaintiffs' suit founded on correct allegations of fact could not be barred by the withdrawal of the suit of their mother which was founded on false allegations of fact and which was instituted by her not as representing the estate but on her own behalf; and that the tran-

*Appeal No. 368 of 1921. 15th October, 1925.

sactions evidenced by Exs. III, V and VI could not be upheld as family arrangements nor were the plaintiffs estopped from impeaching their validity.

Held further, that the transactions could not be held to amount to a surrender accelerating the reversion, because (1) there was no surrender in favour of all the daughters' sons who were alive at the date of the said transaction; (2) even if the eldest sons of the two daughters could be taken to have represented their brothers there was only an equal distribution of the properties among the reversioners; (3) there was no evidence that the alleged surrender was of all the properties that the widow then had; (4) there was no evidence that the daughters, *T* and *L* had surrendered their interests.

Bona fides is not incompatible with ignorance of law, nor even with a certain degree of negligence.

Under S. 51 of the Transfer of Property Act, the person evicting has the choice of either paying the value of the improvement and taking the land or selling it to the purchaser The purchaser has no such choice.

Appeal against the decree of the Court of the Subordinate Judge of Mayavaram in O. S. No. 54 of 1918.

The Advocate-General and *M. S. Venkatarama Aiyar* for appellants.

T. R. Ramachandra Aiyar, N. A. Krishna Aiyar and *P. J. Kuppanna Rao* for respondents.

The Court delivered the following

Ramesam, J.

JUDGMENTS :—*Ramesam, J.* :—This appeal arises out of a suit by the reversioners of one Ananthakrishna Aiyar for possession of his properties after the death of the last intermediate female in 1918. The Subordinate Judge dismissed the suit. The plaintiffs appeal.

Ananthakrishna Aiyar died in 1858 leaving a widow and two daughters. The widow died about 1868-70. Her first daughter died in 1902. She had three sons all of whom died before 1918 leaving no issue. The second daughter died in 1918 leaving the five plaintiffs surviving her. They are, therefore, reversioners to the estate of Ananthakrishna Aiyar and are *prima facie* entitled to his properties. The following pedigree shows these facts at a glance :—

Ananthakrishna Iyer d 1858—widow Thayammal d 1868-70.

Two daughters.

- Thallammal d. 1902.
  - Ramaswami Iyer.
  - Vaidyanatha Aiyar.
  - Another.
  - Died before 1918
- Lakshmi Ammal d. 1918.
  - Rama Iyer
  - Subramania Iyer
  - Muthu Iyer
  - Srinivasa Iyer
  - Sundara Iyer
  - (Plaintiffs).

Rama Aiyar v. Narayanaswami Aiyar — Ramesam, J.

The facts on which the defendants resist the suit are as follows:—On 22nd July, 1867, the widow executed four documents (Exs. III, IV, V and VI). By Ex. III she purported to sell her house to her eldest grandson Ramaswami Aiyar for Rs. 400. The object of this sale was ostensibly to pay off Rs. 300 promised to Lakshmi Ammal at the time of her marriage and Rs. 100 similarly to Thailammal. By Ex. V she conveyed lands in Radhanallur worth Rs. 380 and moveables of the value of Rs. 20 to the same Ramaswami Aiyar in consideration of his having performed the funerals of Ananthakrishna Aiyar and of his undertaking to perform also her funerals. In Anaithandavapuram she had half *pangu* of lands. She gave away one-fourth *pangu* to Ramaswami Aiyar by Ex. VI and the other one-fourth *pangu* to Ramu Aiyar (the eldest son of the second daughter) by Ex. IV. The defendants contend that these documents amount to a surrender by Thayammal accelerating the reversion; they also amount to a *bona fide* family settlement and that no reversion devolved on plaintiffs in 1918 The plaintiffs are also said to be estopped. The Subordinate Judge upheld these contentions.

In 1902, after the death of Thailammal, Lakshmi Ammal filed a suit to recover the properties conveyed to Ramaswami Aiyar by Exs. III, V and VI and afterwards alienated by him and his brother Vaidyanatha Aiyar to the predecessors-in-title of the present defendants under Exs. XIV and XV in 1884, on allegations which were obviously untenable (O. S. No. 12 of 1902). She withdrew it (Ex. I-E dated 9th Sept. 1903). The present suit is filed to recover the same properties, the plaintiffs being in possession of the properties conveyed by Ex. IV. The defendants also contended that the present suit is barred by the said withdrawal. The Subordinate Judge upheld this contention relying on 12 L. W. short notes p. 25. He seems to have been misled by the shortnote which does not state the facts fully. The case is reported in *Kadakkarai Nadan* v. *Nadakkannu Nadan* (1). What was held was that a *bona fide* compromise of a litigation by a Hindu widow (suing on behalf of the estate and therefore representing the reversioners) in the exercise of her discretion and in the belief that it would be in the best interests of the estate is binding on the reversioners, a principle impliedly recognised in 1863 by the decision in *Katama Nachiar* v. *The Rajah of Shivaganga* (2). In the present case, Lakshmi Ammal was not acting for the estate and

1. (1921) M W N 342. 2. (1863) 9 M I A 539.

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on behalf of the reversioners. She was suing to recover possession of her limited estate of a daughter. There was no compromise but a withdrawal of the suit. The decision relied on by the Subordinate Judge does not apply. On principle, it is very difficult to understand how the present suit in 1918 by the plaintiffs on correct allegations of fact can be barred by the withdrawal of a suit in 1903 by their mother on false allegations of fact made to avoid the obvious bar by limitation. The plaintiffs' suit in 1918 not being so barred Lakshmi Ammal's succession opened on Thayammal's death in 1868-70 and, if she chose to question Exs. III, V and VI, she ought to have done so within twelve years after her mother's death. But plaintiffs' right opened in 1918 and her withdrawal of her claim can have no bearing on plaintiffs' suit. Mr. Ramachandra Aiyar, the learned Vakil for the respondents, who argued the rest of the case most strenuously, while not abandoning this point could urge no argument to support it. The cases of *Ramalinga Mudali* v. *Arumuga Mudali* (3) and *Singa Reddy* v. *Subba Reddy* (4) (where the earlier suit was by the reversioner himself) are against the contention.

I now go to the merits of the case. As I have already said, the Subordinate Judge upheld the contentions of the defendants that the transactions of 1867 amount to a surrender by Thayammal, also constitute a *bona fide* family arrangement binding on all the parties and also estop the plaintiffs.

It will be convenient to dispose of the last two contentions first as it seems to me that they are obviously untenable. In discussing these questions, I assume that the transactions of 1867 do not amount to a surrender. For, if they amount to a surrender, the defendants are entitled to succeed on that ground. We have to see, at present, whether any ground of defence *other than that the transactions operate as a surrender* is available to the defendants.

It is well established that a *bona fide* family settlement of disputes or doubtful rights is binding on all the parties to the settlement. The rule in *Stapilton* v. *Stapilton* (5) and *Williams* v. *Williams* (6) has always been applied in India; but, where the object of the settlement is to affect a contingent reversionary interest in the nature of a *spes successionis,* the only way of doing it is by means of a surrender, accelerating the reversion and converting its contingent nature into a vested interest and thus destroying its character

3. (1917) 33 M L J 471. 4. (1915) I L R 39 M 987: 31 M L J 48 (F B).
5. (1739) 1 Atk. 2. 6. (1867) L R 2 Ch App. 294.

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as a *spes successionis*. That a *spes successionis* cannot be dealt with in anticipation was laid down so early as in *Bahadur Singh* v. *Mohar Singh* (7). The following sentences of Lord Davey have become classic:

"According to Indian Law, the claimants of 1847 were but expectant heirs with a *spes successionis*. The appellants claim in their own right as heirs of Mohar when the succession opened, and it would be a novel proposition to hold that a person so claiming is bound by a contract made by every person through whom he traces his descent."

This law has been faithfully applied in India till 1908 when some confusion was caused in Indian Courts by the supposed dictum to the contrary in *Bajrangi Singh* v. *Manokarnika Baksh Singh* (8) of Sir Andrew Scoble. At page 16 of the Indian Appeals (at p. 21 of I L R 30 All.) he said:

"The appellants who claim through Matadin Singh and Baijnath Singh must be held bound by the consent of their fathers."

It gave rise to the Full Bench decision in *Rangappa Naick* v. *Kamti Naick* (9) and various other conflicting decisions in other Courts till all doubts were set at rest by the decision of the Judicial Committee in *Rangaswami Goundan* v. *Nachiappa Goundan* (10). The principle that an interest in the nature of a *spes successionis* cannot be affected has been meanwhile reaffirmed by the Judicial Committee in *Amrit Narayan Singh* v. *Gaya Singh* (11). In that case the appellant's father expressly purported to act for his wife and son in the reference to arbitration and the compromise that followed. The Judicial Committee held that the appellant was not bound by the proceedings. In *Rangaswami Goundan* v. *Nachiappa Goundan* (10) Lord Dunedin said at page 82 of the Indian Appeals (page 534 of I. L. R. 42 Mad.) :—

"But that is impossible unless the reversioner had a vested interest whereas it is settled that he had only a *spes successionis*."

Mr. Ramachandra Aiyar relied on the cases in *Sureshwar Misser* v. *Maheshrani Misrain* (12), *Fateh Singh* v. *Thakur Rukmini Ramanji Maharaj* (13) and *Sartaji* v. *Ramjas* (14). The first case does not help the respondent as it was held that the compromise effected a surrender. So also *Sartaji* v. *Ramjas* (14) was a case of surrender. In *Fateh Singh* v. *Thakur Rukmini Ramanji Maharaj* (13) it was held that a

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7. (1901) L R 29 I A 1 : 12 M L J 56 (P C).
8. (1907) L R 35 I A 1 · I L R 30 A 1 : 17 M L J 605 (P C).
9. (1908) I L R 31 M 366: 18 M L J 309 (F B).
10. (1918) L R 46 I A 72 : I L R 42 M 523 : 36 M L J 493 (P C).
11. (1917) L R 45 I A 35 · 34 M L J 298 (P C).
12. (1920) L R 47 I A 233 : 39 M L J 161 (P C).
13. (1923) I L R 45 All 339 (F B). 14. (1923) I L R 46 All 59.

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reversioner who actually consented to an alienation by a widow is himself estopped though it may not bind his co-reversioners. It is not a case of a reversioner tracing his descent through a consenting party as in *Bajrangi Singh* v. *Manokarnika Baksh Singh* (8). The point was not decided in *Rangaswami Goundan* v. *Nachiappa Goundan* (10). At page 87 of *Rangaswami Goundan* v. *Nachiappa Goundan* (10) (p. 539 of I. L. R. 42 Mad.) Lord Dunedin said :—

> "Of course something might be done before that time which amounted to an actual election to hold the deed good."

Mr. Ramachandra Aiyar relied on the following facts in the present case to attract the application of *Fateh Singh* v. *Thakur Rukmini Ramanji Maharaj* (13) : (1) The 1st plaintiff Ramu Aiyar attested the sale-deeds, Exs. XIV and XV in 1884. (2) He asserted his right to the lands covered by Ex. IV in a claim petition in 1905 in execution of the decree in his mother's suit (O. S. No. 12 of 1902, Ex. 1-F). (3) There was a partition of the properties, given by Ex. IV, between the plaintiffs (Ex. XXII).

I do not see how the attestation of Exs. XIV and XV can affect the plaintiffs. In the first place mere attestation of the sale-deeds cannot amount to a knowledge of the contents [*Parsotam Gir* v. *Dat Gir* (15)] nor to concurrence [*Raj Lukhee Debee* v. *Gopal Chunder Chowdhry* (16)]. In any event it cannot amount to such an affirmation of the conveyance by the widow in 1867 as to "amount to an actual election to hold the deed good." As to the claim petition (Ex. 1-F) and the partition (Ex. XXII) I am unable to see how they can help the respondent. Under Ex. IV, Ramu Aiyar had some interest. It did not deal with a mere life-interest [see *Rajah Modhu Sudan Singh* v. *Rookee* (17) and *Bijoy Gopal Mukerji* v. *Krishna Mahishi Debi* (18)]. The gift of the whole interest in the property is good against all the world until the reversion falls in, and even then it is liable to be questioned by the actual reversioners only. When so questioned, if the attack is successful, the interest terminates. A person who asserts in 1905 such interest as he had or divides it with his brothers in 1907 cannot be precluded

8 (1907) L R 35 I A 1 : I L R 30 A 1 · 17 M L J 605 (P C).
10. (1918) L R 46 I A 72 : I L R 42 M 523 · 36 M L J 493 (P C).
13. (1923) I L R 45 All 339 (F B). 15. (1903) I L R 25 All 296 at 303.
16. (1869) 13 M I A 209 at 229
17. (1897) L R 24 I A 164 : 7 M L J 127 (P C).
18. (1907) L R 34 I A 87 ; 17 M L J 154 (P C).

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by such assertion or partition from asserting his claim as a reversioner in 1918. The plaintiffs had some interest between 1867 and 1918 and dealt with it for what it was worth. In 1867, the first plaintiff was a minor and could not consent to a family arrangement so as to make the case *Fateh Singh* v. *Thakur Rukmini Ramanji Maharaj* (13) applicable. The plaintiffs 2 to 4 were not born in 1867 nor were they parties to Ex. 1-F in 1905; neither did they attest any sale-deeds and the argument cannot possibly apply to them. *Jiwan Singh* v. *Misri Lal* (19), *Syed Nurul Hossein* v. *Sheosahai* (20), *Rup Narain* v. *Mussammat Gopal Devi* (21) are cases where the reversioners were held not to be estopped by having had some connection with the sales by the widow. I think that the present case is stronger than them and than *Rangaswami Goundan* v. *Nachiappa Goundan* (10) where Lord Dunedin said at page 87 of the Indian Appeals:—

"Now at the time of the mortgage the plaintiff did not know whether he would ever be such a reversioner in fact as would give him a practical interest to quarrel with the deed of gift. Why should he not take all that the mortgagors could give or propose to give? To hold that by so doing he barred himself from asserting his own title to part of what was mortgaged seems to their Lordships a quite unwarrantable proposition."

The decision in *Joga Yerrayya* v. *Salleyya Patrudu* (22) supports the appellant.

I am therefore of opinion, that, unless the deeds of 1867 can amount to a surrender, there is no defence available in the suit.

This leads me to the discussion of what is the most important point, viz., whether Exs. III, IV, V and VI or some of them amount to a surrender.

The requirements of a surrender are now well established by various decisions of the Privy Council. It is unnecessary to refer to them in detail. The leading case is *Behari Lal* v. *Madho Lal Ahir Gyawal* (23). In *Rangaswami Goundan* v. *Nachiappa Goundan* (10) Lord Dunedin describes it as an effacement which opens the estate of the deceased husband to his next heirs at that date. In the present case, as the intermediate heirs consist of not only the widow but also the

10. (1918) L R 46 I A 72 : I L R 42 M 523 : 36 M L J 493 (P C).
13. (1923) I L R 45 All 339 (F B).
19. (1895) L R 23 I A 1 : 6 M L J 47 (P C).
20. (1891) L R 19 I A 221 (P C).
21. (1909) L R 36 I A 103 : 19 M L J 548 (P C).
22. (1922) 16 L W 752. 23. (1891) L R 19 I A 30 (P C).

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daughters, in order to effectuate a surrender in favour of daughters' sons there must be an effacement of the widow and the daughters. The renunciation must be of all the properties. In *Basangavda* v. *Basangavda* (24), Beaman, J., describes it as the obliteration of a bar. The Subordinate Judge has stated the requirements of a surrender correctly but I regret I am not able to agree with his conclusion.

Let us look at the situation in 1867. There were then five daughters' sons, three of the elder daughter and two of the younger daughter—Ramu Aiyar, the 1st plaintiff and another Krishna Aiyar, since deceased. There is no surrender in favour of all the five daughters' sons. It is said for the respondent that the intention of the widow was to give the property to all the five and the later enjoyment is relied on for this purpose. It does not appear that the properties covered by Exs. III, V and VI were shared by Ramaswami Aiyar and his two brothers. Only one of them joined in the reconveyance of these properties under Exs. XIV and XV. As to the properties covered by Ex. IV the later partition under Ex. XXII was between the plaintiffs and their brother Krishna Aiyar, four of whom were unborn in 1867. I do not see how this supports a renunciation in favour of the 1st plaintiff and Krishna Aiyar only. A more insuperable objection seems to me that the renunciation should be in favour of all the then reversioners and of all the properties. What we have is conveyance of certain properties to Ramaswami Aiyar under Exs. III, V, VI and of certain other properties under Ex. IV to Rama Aiyar. Assuming that Ramaswami Aiyar represented himself and all his brothers and Rama Aiyar also represented his own brother there is a distribution of the properties among the reversioners. Mr. Ramachandra Aiyar contends that Ex. III must be regarded as an alienation and after the distribution of Rs. 400 realised by it the shares conveyed by Exs. V and VI and by Ex. IV were nearly three-fifths and two-fifths. The value of the properties given to the eldest daughter's branch consists of Rs. 100 (Ex. III), Rs. 380 and Rs. 20 (Ex. V), Rs. 500 (Ex. VI), totalling Rs. 1,000. The value of the properties given to the other branch amounts to Rs. 800, consisting of Rs. 500 (Ex. IV) and Rs. 300 (Ex. III). But I do not see how we can add the Rs. 300 and Rs. 100 which were given to the daughters, to the properties conveyed to the daughters' sons. The respondents contend that Ex. III is a genuine transaction

24. (1914) I L R 39 B 87.

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and the surrender is only under Exs. IV, V and VI. In the litigation of 1902, evidence was given that it was a bogus transaction on one side and the other side contended it was genuine. We have no means of deciding the truth at this distance of time nor is it necessary. On any view of the transaction covered by Ex. III, there can be no surrender in shares of three-fifths and two-fifths. If the transaction was not a genuine one, the elder branch got properties worth Rs. 1,300 consisting of Rs. 400 (Ex. III), Rs. 380 and 20 (Ex. V), Rs. 500 (Ex. VI) and the younger branch got only properties worth Rs. 500 (Ex. IV). If the transaction was genuine, the cash realised by Ex. IV went to the daughters and the elder branch of daughter's sons got Rs. 900 worth and the younger branch Rs. 500 worth of properties. In either way, the distribution was unequal. But there is the more important objection that to regard these documents as constituting (1) a surrender, and (2) a partition between the two branches has no justification. Who represented the minors in the partition? Could they have set aside the partition as unfair after the minors attained majority? If Rama Aiyar and his brother made such an attempt they would have been met by the plea that the transactions were separate conveyances and one branch had nothing to do with the properties given to the other. The plea would have been successful. In my opinion, the contentions of the respondents require us to strain the nature of the transactions too far, for the purpose of upholding them as a surrender.

Again, there is no evidence that the daughters have surrendered their interests. All that we have is that, till 1902, the two daughters did not question the transaction of 1867. In 1902, after Thailammal's death, the second daughter questioned them but it was too late and she had to withdraw her suit. The only witness examined in the case says that the daughters were present when the documents were executed. It is difficult to construe their mere presence, or subsequent silence or inaction as tantamount to surrender. The witness does not say that they renounced their interests. If the daughters chose to bring a suit to set aside the documents of 1867, within twelve years after their mother's death, there was no defence to such a suit.

Again, the surrender must be of all the husband's properties. Perhaps the properties covered by Exs. III, IV, V and VI were all she then had but there is no evidence to prove this.

It is unnecessary to further discuss this point, in view of the other difficulties pointed out by me.

The truth seems to be that the idea of a surrender was then not known; otherwise there is no reason why the parties should disguise the real nature of the transaction (a surrender and partition according to the respondent) and carry it out in some other form which does not effectuate the intention of the parties.

Of the cases relied on by the respondents, *Sri Rajah Suryarao Rao Bahadur Garu* v. *Sri Rajah Suryanarayana Jagapathi Bahadur Garu* (25) is a case in which the surrender (which was effected by the document of 1890) was in favour of both the daughters' sons under a single document. The case in *Munugarra Satyalakshmi Narayana* v. *Munugarra Jagannadham* (26) came up on second appeal with a finding that there was an oral surrender. In *Bhagwat Koer* v. *Dhanukdhari Prasad Singh* (27), the only difficulty was that the documents were drawn up on the footing of an acknowledgment of right and their Lordships held that this does not matter. There was only one reversioner, Mahabir, and a complete self-effacement of the widow in his favour. Here we have a transfer of one set of properties to one group of reversioners (at the best) and of another set to another group and we have to introduce a fictitious partition to read the transaction as a surrender. The cases do not help the respondents.

I have therefore to disagree with the conclusion of the Subordinate Judge.

The hardship is only apparent. The transactions of 1867 were given complete effect up to 1918 when the reversion falls in and the Hindu Law takes its course. It is just in such a case that one has to guard oneself against sympathy with the respondents arising out of a vague feeling, that an old transaction should not be cancelled. The truth is there is no unsettling of an old transaction. The old transaction has had its full legal effect and new rights arose in 1918.

The appeal will have to be allowed. But before doing so, a finding has to be called for on the 14, 15, 17, 19, 20 and 21st issues. Time one month; ten days for objections.

Reilly, J.

Reilly, J. :—I agree.

This appeal coming on for orders for being spoken to on Monday, the 29th day of September, 1924, the Court made the following

25. (1921) 41 M L J 208. 26. (1917) 34 M L J 229.
27. (1919) I L R 47 C 466 : 37 M L J 513 (P C).

ORDER :—The Subordinate Judge will take any evidence that may be adduced by the parties in all the issues on which findings have been called for (by the order of this Court dated 15th August, 1924) and will submit fresh findings in supercession of the findings, if any, already sent. One month from this date is allowed for sending the findings and seven days for filing the memorandum of objections to the said findings.

In compliance with this order dated 9th Sept., 1924 and the order contained in the above judgment dated 15th August, 1924, the Subordinate Judge of Mayavaram submitted the following

FINDINGS :—

Issue 14: In case the sale of the house in item No. 29 in Sch. B, Part 1, is found to be not binding on the plaintiff, to what equity, if any, are the defendants 1 to 6 entitled ?...............As I am of opinion that the finding on the first issue is binding upon the parties and that the Commissioner's account is entitled to greater weight than the testimony of the witnesses, I hold that the compensation payable to defendants 1 to 6 is Rs. 10,000 *minus* the value of the site of the house which has been agreed by the parties to be Rs 1,500. And I also find that defendants 1 to 6 should be ordered to pay plaintiffs Rs. 1,500 as the market value of the site, if it should be held that the choice lies with them of receiving compensation for the house or purchasing the site of the house.

Issue 15: Whether the present building on item No. 29 in Sch. B, Part 1, of the plaint belonged to Ananthakrishna Aiyar, and, if not, whether the plaintiffs have any right to claim the same?....................Consequently the question whether plaintiffs have any right to claim the house depends upon the finding on the 14th issue as to whether they can claim to retain the house paying or not paying compensation to defendants 1 to 6 according as it is decided that defendants 1 to 6 are, or are not, entitled to compensation.

Issue 17: What, if any, is the amount of mesne profits due to the plaintiffs from the defendants 1 to 10 and their alienees?....................For these reasons, I find that plaintiffs are not entitled to anything on account of mesne profits from defendants 7 to 10 of 16th and 17th defendants, that they are entitled to the price of 59 kalams of samba paddy at Rs. 1-12-0 per kalam *minus* Rs. 53 on account of land revenue and Rs. 25 on account of maramat per veli from defendants 1 to 6, the price of 33 kalams of samba paddy at Rs 1-12-0 a kalam *minus* one-half of the above mentioned expenses from defendants 11 and 12 and Rs. 2-4-0 from defendants 13 to 15.

Issue 19: Were such of those properties as are in possession and enjoyment of defendants 11 to 17 obtained from defendants 1 and 9 in exchange for their own properties ?

Issue 20: Are such exchanges true, valid and binding on the plaintiffs? ....I find the exchanges alleged by defendants 11 and 12, 16 and 20 to be true and that alleged by defendants 13 to 15 to have not been proved. And on the twentieth issue, it has to be found that the exchanges are not binding on the plaintiffs as no ground has been shown for holding them to be binding on the plaintiffs.

Issue 21: Are the alienees entitled to any and what amount for improvements effected by them? What further equities are the alienees entitled to,

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and if so, from whom?...............I find that 16th and 17th defendants should be paid some amount as compensation for improvements but there is no proof of the amount if he is found entitled to compensation. But I find no defendant is entitled to anything on account of improvements or other equities from plaintiffs for the reasons given for holding defendants 1 to 6 are not entitled to compensation. It is unnecessary to decide the questions as between the defendants.

After the return of the findings the Court delivered the following

JUDGMENT :—The main question for consideration is whether defendants 1, 3 and 4 are entitled to compensation for a building that they have erected on the land covered by the sale-deed, Ex. III. The Subordinate Judge has found that their father, who actually effected the improvements, did not *bona fide* believe that he was the owner of the property. This question of *bona fides* is a somewhat difficult question and it must depend upon the circumstances of each case. It has been held that *bona fides* is not incompatible with ignorance of law, *Durgozi Rao* v. *Fakeer Sahib* (28) nor is it incompatible with a certain degree of negligence, as is clear from the definition in the General Clauses Act, S. 3, cl. 20. The degree of negligence is, of course, a matter to be determined according to the circumstances of each case. In this case, it is as well to set out what are the actual facts.

In 1867, one Thayammal sold this property to her daughter's sons under Ex. III and the only evidence available shows that money was paid. At the same time she executed another sale-deed and two gift deeds which disposed of the whole of the rest of her property in favour of the same grandson and another grandson by her younger daughter. In 1884 the purchaser under Ex. III and his younger brother executed Ex. XIV in favour of the first defendant's father, and it is noticeable that this document is attested by the first plaintiff in this suit. In 1898 the improvement was effected to an extent of Rs. 4,000 by the defendant's father, and he subsequently made an addition to the building at a cost of Rs. 1,500 in 1903. We see thus that for 30 years the alienation was not questioned by anybody, not even by the daughters nor by their sons. It was only in 1902 that one of the daughters brought a suit. It is contended that, inasmuch as the defendant's father in 1902 raised no real defence to the suit by the reversioners it must be deemed that he had no *bona fide* belief in his title; but it must be remembered that this statement was filed after consultation

28. (1906) I L R 30 M 197: 17 M L J 9.

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with a legal adviser, who probably told him that his case was bad as has now been found to be the case, but it does not follow that in 1898 he did not believe that his case was good. The whole of the circumstances attending the original alienation by the widow are somewhat peculiar and they were acquiesced in by practically all the members of the family then alive, and possession having been undisturbed for 30 years, we think that it is quite reasonable to suppose that the defendant's father believed that he had a good title; otherwise, he is hardly likely to have squandered such a large sum of money on property which he knew was likely to pass out of his possession.

As regards the improvement made in 1898, therefore, we must hold that the defendant's father *bona fide* believed that he was the owner of the property; but the improvement made in 1903 stands on a very different footing. Then suits had been filed by Thayammal's daughter and by her grandsons for the recovery of the property and for declaration respectively. In defence of the latter suit, after taking legal advice, the defendant's father had nothing to say. Notwithstanding this a month or two before the suit was actually disposed of with findings against his title, he proceeded to spend Rs. 1,500 on the building. At that time, it certainly has not been shown that he still believed that he was the owner of the property. As regards this latter sum the defendants are not entitled to compensation.

There remains then the question of the value of the improvements. The whole house, as it now stands, has been valued by the Commissioner at Rs. 10,000, and, in coming to this estimate, he has adopted the rates in building materials prevalent in the neighbouring town of Mayavaram. These rates are apparently excessive for building a house in a village and when we remember that the money actually spent on the building in 1898 and 1903 was only Rs. 4,000 and Rs. 1,500 it is difficult to believe that in a country village the value has now risen to very nearly double that amount. If we take it that the value has increased by about 50 per cent., we shall be nearer the correct value and we accordingly adopt the figure of Rs. 8,000 as the value of the whole structure. Defendants, who are entitled to compensation in respect of Rs. 4,000 out of Rs. 5,500 spent by their father, are entitled to 8|11ths of Rs. 8,000 or roughly Rs. 5,800. We accordingly fix the compensation due to them at Rs. 5,800.

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The question of election by the transferee was raised and it was contended that the choice lay with the transferee under the provisions of S. 51, Transfer of Property Act, but we are satisfied that, under S. 51, the choice is with the person evicting. He can either pay the value of the improvement and take the land or sell the land to the purchaser.

If the portion that was built in 1903 can be definitely ascertained, defendants 1, 3 and 4 will be allowed to remove the materials thereof in the presence of an officer of the Court and of the plaintiff or his son, so as not to cause any diminution in the value of the remainder of the building. This removal must be carried out within one month of ascertainment by the Court whether this part of the building can be satisfactorily identified.

We accept the findings on the other issues. The future mesne profits will have to be ascertained by the Lower Court before passing a final decree.

Th respondents will pay the appellant's costs of the appeal in the Lower Court.

A. S. V. *Decree modified.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE DEVADOSS AND MR. JUSTICE WALLER.

Ramasankara Aiyar Sankaranarayana Aiyar ... *Appellant** *(2nd respondent)*

v.

The Firm of V. K. R. Krishna Aiyar & Sons, represented by one of its partners, V. K. R. Venkateswara Aiyar, and others ... *Respondents (Petitioner 1st respondent and party respondent).*

Ramasankara Aiyar Sankaranarayana Aiyar v. Krishna Aiyar & Sons.

Provincial Insolvency Act, S. 6 (e)—Partner—Sale of separate property of one, in execution of decree against partnership—No act of insolvency on part of other partner.

In execution of a decree obtained against a partnership, the separate property of one of the partners was attached and sold. *Held,* that such attachment and sale did not amount to an act of bankruptcy on the part of the other partner of the firm, and that he could not be adjudicated an insolvent on that ground.

Appeal against the order of the District Court of Tinnevelly, dated 6th December, 1923 in I. P. No. 29 of 1922.

*A A O No. 215 of 1924. 24th March, 1926.

K. V. Sesha Aiyangar and *S. Venkataraman* for appellant.

P. S. Narayanaswami Aiyar and *P. S. Ramachandra Aiyar* for respondents.

The Court delivered the following

JUDGMENT :—This is an appeal by the 2nd respondent in the Lower Court against the order of the District Judge of Tinnevelly adjudicating him an insolvent. The learned Judge finds that the 1st respondent's property was attached and sold on the 23rd June, 1922, and that amounts to an act of bankruptcy on the part of the appellant. The appellant and the 2nd respondent herein were partners in trade. A decree was obtained against the partnership and the property of the 2nd respondent herein was attached and brought to sale. Under S. 6 (*e*) of the Provincial Insolvency Act a person commits an act of insolvency if any of his property has been sold in execution of a decree of any Court for payment of money. No property of the appellant was sold in execution of a decree for money. The contention on behalf of the 1st respondent is that the attachment and sale of property of a partner is sufficient to bring the appellant within the provisions of S. 6 (*e*). Sub-section (*e*) refers only to the property of the person against whom an application for adjudication is made. It cannot be said that the property of one partner becomes the property of the other by reason of their being partners. It is not contended that the property that was brought to sale on the 23rd of June was partnership property. If the partnership property had been brought to sale within three months of the presentation of the petition for adjudication all the members of the partnership could be adjudicated insolvents. Here, only the separate property of a partner was attached and sold and that cannot be held to mean that the property of the appellant was brought to sale. So far as the property of the partners is concerned, that is liable only in case the partnership assets are not sufficient to satisfy the creditors' claims. Even then the separate property of the partners remains as such and the mere fact that it is liable for partnership debts would not make it partnership property. The appellant not having committed an act of bankruptcy within three months of the presentation of the application, the order of adjudication is illegal. We therefore allow the appeal with costs.

A. S. V. *Appeal allowed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE WALLACE.

K. C. Menon ... *Petitioner** (*Complainant*)

v.

P. Krishnan Nayar ... *Respondent* (*Accused*).

K. C. Menon *v.* Krishnan Nayar.

Criminal Procedure Code, S. 252—Witnesses for prosecution—Examination of—Procedure as to—Ascertainment by Magistrate of names of persons likely or able to give evidence for prosecution—Stage of—Mode of—Summons to such persons—Issue of—Discretion as to—Principles of exercising.

Under S. 252 of the Criminal Procedure Code, the complainant should himself produce what evidence he can in support of the prosecution and the Magistrate must proceed (to hear it. The Magistrate is not bound to issue process for such witnesses, or to grant time for the production of such witnesses, but if produced he must record their evidence. When the complainant has done all he can without the assistance of the process of the Court, it is then for the Magistrate to ascertain *from the complainant* or otherwise the names of other persons likely or able to give evidence. He must issue summons to persons of whom the complainant has informed him, who, he considers, are likely to give useful evidence. The proper time for the Magistrate to ascertain the names of such persons is when the evidence "produced" in support of the prosecution has been taken, and that ordinarily includes the cross-examination, if any, and re-examination, if any, before the charge. The discretion to summon or not to summon lies with the Magistrate. But he is not to interpret that discretion in a narrow or purely technical sense. He must look at the prosecution case broadly, decide what are the broad allegations of facts on which the complaint is founded and then determine whether the evidence offered is not necessary to assist in the establishment of that case.

In the case of a prosecution for offences under S. 477-A of the Penal Code and S. 282 of the Indian Companies Act, the witnesses named in the complaint were examined and cross-examined. The complainant then put in a further list of four witnesses, who were also examined by the Magistrate. Before their examination was over, the complainant put in another list of witnesses to whom the Magistrate refused to issue summons on the ground that it was a new matter. It appeared from the Magistrate's order that, though he asked the complainant after the examination-in-chief of his original witnesses whether he had any more witnesses to examine, he did not ask him that question after the examination of the original witnesses was over.

Held, that the Magistrate had not complied with the law.

The stage of examining the original witnesses being over, the Magistrate was bound to ascertain from the complainant whether there were any other persons able to give evidence in support of the prosecution.

Petition under Ss. 435 and 439 of the Code of Criminal Procedure, 1898, praying the High Court to revise the order of the Court of the Sub-divisional Magistrate of Calicut, dated 19th December, 1925, in C. C. No. 136 of 1925.

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*Cr. R. C. No. 153 of 1926.
Cr R P No. 136 of 1926. ... .. 25th March, 1926.

K. C. Menon v. Krishnan Nayar.

K. S. Jayarama Aiyar for petitioner.

The Public Prosecutor and *M. C. Sridharan* for respondent.

The Court made the following

ORDER:—This is a petition to revise the order of the Sub-divisional Magistrate of Calicut refusing the petitioner's petition to summon certain witnesses for the prosecution. The petitioner is prosecuting the accused for offences under S. 477-A of the Indian Penal Code and S. 282 of the Indian Companies Act for concocting false balance sheets, when he was the Managing Director of the Manorama Printing Works in 1921 and 1922, in particular for showing an inflated and false value of the stock in hand and including in the company's stock the full value of books only sent to them for sale on commission. The petitioner filed his complaint on 3rd November, 1925 naming three witnesses. At that time the books of the company had been impounded and were in the Lower Court. His witnesses were examined on 23rd and 24th November, 1925 and cross-examined on 5th and 6th December, 1925. The petitioner put in a further list of four witnesses styled "experts in valuation," and the Magistrate examined these on 12th December, 1925 and 19th December, 1925. On 17th December, 1925 the petitioner put in a further list of witnesses stating that he had got further information about the inclusion in the stock list of books which never belonged to the company and were not in its possession, some of which the petitioner had secured. The Lower Court refused to summon these on the ground that it was new matter, and the petitioner has put in this revision petition.

His chief point is that at the stage which the case has reached, the Magistrate has no option to refuse to examine witnesses cited by him, and he relies on S. 252 of the Criminal Procedure Code. That section lays down that not only shall the Magistrate take all the evidence which may be produced in support of the prosecution but shall himself ascertain the names of other persons able to give evidence for the prosecution and summon such of the latter as he thinks necessary. In the present case, the new list of witnesses is one offered by the complainant himself, just as his previous list of expert witnesses was offered, some time after the complaint was filed and after the trial had begun. What then is the proper attitude for the Court to take up regarding such a list? The section does not appear to me to be very clear on the point; but, as I read it, it means first that the complainant should himself pro-

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duce what evidence he can in support of the prosecution and the Magistrate shall proceed to hear it. The Court is apparently not bound to issue process for such witnesses, or to grant time for the production of such witnesses, but if produced he must record their evidence. There is no section here corresponding to S. 208 (3) in the case of committal proceedings or S. 244 (2) in the case of trial in summons cases. This is a remarkable omission as otherwise the language "shall take all such evidence as may be produced in support of the prosecution" is the same in all the three sections; and S. 257 gives the *accused* the power of asking the Magistrate to issue compulsory process, while S. 252 itself gives the Magistrate power to summon persons whom he has himself ascertained to be acquainted with the facts of the case. Next when the complainant has done all he can without the assistance of the process of the Court, it is then for the Magistrate to ascertain *from the complainant* or otherwise the names of other persons likely or able to give evidence and he must summon such of those as he thinks necessary, *i. e.*, such of those he thinks will be of value in assisting the prosecution case. He cannot, I take it, arbitrarily refuse to summon such witnesses.

It is his duty to assist and not to hamper the prosecution and for that purpose he must issue summons to persons, of whom the complainant has informed him, who, he considers, are likely to give useful evidence. Obviously, I take it that the Magistrate is not bound to or expected to exercise his duty of "ascertaining" more than once, and the proper time is when the evidence "produced" in support of the prosecution has been taken, and that ordinarily includes the cross-examination, if any, and re-examination, if any, before the charge [see *Varisai Rowther* v. *King-Emperor* (1)].

Now, I find from the Magistrate's order that though he asked the complainant after the examination-in-chief of his original witnesses whether he had any more witnesses to examine, he did not and has not yet asked him that question after the examination of the original witnesses was over nor was the question in the proper form. The question to be asked is not whether complainant has any more witnesses whom he can produce without summons but whether he can inform the Court of any witnesses who will have to be brought by process. The Magistrate has therefore in my view not complied with the law. The stage of examining the original witnesses produced by the complainant is over. But still, the Court has to as-

1. (1922) I L R 46 M 449: 44 M L J 567 (F B).

K. C. Menon v. Krishnan Nayar.

certain from the complainant whether there are any other persons able to give evidence in support of the prosecution. The Court must remedy this defect and must do so now.

As to whether the petitioner has traversed new grounds, the consideration of that matter seems to me not at all a matter of procedure on which I can at this stage be properly called upon to give a decision. The discretion to summon or not to summon lies with the Magistrate. But he is not to interpret that discretion in a narrow or purely technical sense. He must look at the prosecution case broadly, decide what are the broad allegations of facts on which the complaint is founded and then determine whether the evidence offered is not necessary to assist in the establishment of that case. A useful test will be whether, if the accused were acquitted in this case, it would be open to the complainant to put in a fresh complaint on the facts now put forward.

I set aside the order and direct that the petition be reheard in the light of the above remarks.

A. S. V. *Order set aside: Petition remanded.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—MR. JUSTICE DEVADOSS AND MR. JUSTICE WALLER.

Raja Rao *alias* Vidiachar
and another ... *Petitioners** (*1st and 2nd counter-ptrs.*)

Raja Rao, *In re.*

Criminal Procedure Code, S. 476—Court's duty under—Preliminary enquiry—Necessity—Nature, method and extent of such enquiry—Discretion of Court as to—Cross-examination of witnesses giving evidence at such enquiry—Opportunity of, to future accused—Omission to give—Validity of enquiry in case of.

What a Court has to decide under S. 476, Criminal Procedure Code, is (1) whether an offence of the kind contemplated *appears* to have been committed, and (2) whether it is expedient in the interests of justice that it should be further enquired into. In order to arrive at a decision the Court may, if it thinks fit, hold such preliminary inquiry as it considers necessary. The nature, method and extent of the preliminary inquiry are, however, entirely at its discretion. It is no valid objection to such inquiry that the future accused were not allowed to cross-examine the witnesses who gave evidence against them at the inquiry.

Petition under Ss. 435 and 439 of the Code of Criminal Procedure, 1898, praying the High Court to revise the orders of the Court of the District Magistrate of Coimbatore in Criminal Appeal Nos. 18 and 19 of 1925 preferred to the High Court against the orders of the Court of the Stationary Second

*Cr R C Nos. 711 and 712 of 1925
(Cr R P Nos. 584 and 585 of 1925). 6th April, 1926.

Raja Rao, *In re.*

class Magistrate of Dharapuram in M. C. Nos. 5 and 6 of 1925 respectively.

K. S. Jayarama Aiyar, P. J. Kuppanna Rao and *V. Srinivasarangachariar* for petitioner.

V. L. Ethiraj for the *Public Prosecutor* on behalf of the Crown.

Waller, J.

The Court made the following

ORDER :—*Waller, J.* :—The petitioners seek to have revised the order of the District Magistrate, Coimbatore, dismissing their appeals under S. 476-B, Criminal Procedure Code. They were witnesses for the Crown in C. C. No. 134 of 1925 on the file of the Sub-Magistrate, Dharapuram. That case ended in the discharge of the accused. The Sub-Magistrate held a preliminary enquiry under S. 476, Criminal Procedure Code and ordered complaints to be filed against the petitioners before the 1st class Magistrate at Erode

Mr. Jayarama Aiyar's main ground of complaint is that his clients were not allowed to cross-examine the witnesses who gave evidence against them at the preliminary enquiry. He conceded that, a Magistrate is under no necessity to hold any enquiry at all, but contends that, if he does decide to enquire, the enquiry must be what some of the decisions on the point describe as a "real enquiry". By that expression is, I understand, meant an enquiry at which the future accused is entitled to be present, to cross-examine the witnesses against him and even—vide *Ganeswar Paharaj* v. *King-Emperor* (1)—to produce evidence in his defence. I venture to doubt whether anything of the sort was intended by the legislature. What a Court has to decide under S. 476 is (*a*) whether an offence of the kind contemplated *appears* to have been committed, (*b*) whether it is expedient in the interests of justice that it should be further enquired into. In order to arrive at a decision the Court may, if it thinks fit, hold such preliminary enquiry as it considers necessary. The nature, method and extent of the preliminary enquiry are, it seems to me, entirely at its discretion. The enquiry need not be such as to satisfy the Court that an offence actually has been committed, but merely that an offence appears to have been committed. What Mr. Jayarama Aiyar asks for and some of the rulings quoted grant is the equivalent of a full dress trial, which cannot, I think, have been in the mind of the legislature.

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1. (1921) 6 Pat L J 146.

Raja Rao, *In re*

Waller, J.

This is the view taken in *Abdul Ghafur v. Raza Hussain* (2). Other Allahabad eases have been cited tó the contrary effect, but they have not considered the above ruling and none of them appears in the authorised reports. The latest Madras decision is reported in *Perumalla Venkatasubbiah, In re* (3) where it was held that, in the particular circumstances the party should have been given an opportunity to cross-examine the witnesses against him. With great respect I prefer the Allahabad view above referred to. I cannot believe that the law intends that a Court which has complete discretion to refuse to hold any enquiry at all, must, if it holds an enquiry, issue notice to the party and give him the equivalent of a full dress trial.

The enquiry that many of the rulings prescribe seems to me to go far beyond the essential requirements of S. 476. As I have pointed out above, it is not necessary to find anything more than that an offence appears to have been committed, which ought to be enquired into further. I think that Mr. Jayarama Aiyar's first objection is groundless. His final request shows the complete undesirability of the procedure which he has been advocating. He asks for a transfer of the cases outside Coimbatore district on the ground that the District Magistrate has expressed a strong opinion on the merits. He has no legitimate cause for complaint. The appeals were argued on the merits at great length. Petitioners invited the opinion of the District Magistrate and cannot complain why they have been given what they asked for. If the correct procedure under S. 476 were that advocated by Mr. Jayarama Aiyar a discussion of and decision on the merits would be inevitable in every case. My own view is that the preliminary enquiry under that section should be of a nature merely to satisfy the Court that an offence "appears" to have been committed. Nothing more is necessary and a long discussion of a decision on the merits is as undesirable as it is unnecessary.

I see no reason to suppose that the Magistrate before whom the complaints have been presented has been influenced by the opinion of the District Magistrate. The petitions are dismissed.

Devadoss, J.

Devadoss, J. :—I agree.

A. S. V. *Petitions dismissed.*

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2. (1912) I L R 34 All 267.

3. (1922) 44 M L J 74.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE KRISHNAN AND MR. JUSTICE VENKATASUBBA RAO.

Thatha Seetharama Chetty ... *Appellant** (*Petitioner*)

v.

The Administrator-General of Madras ... *Respondent* (*Respondent*).

Seetharama Chetty *v.* Administrator-General of Madras.

Administrator-General's Act (II of 1874), S. 52—"Assets"—Immoveable property if included in—Cl. (2) of section—"Assets collected and distributed in due course of administration"—Test of, in cases where assets consist of immoveable property—Administrator-General—Commission—Right to—Conditions.

The estate of a deceased person consisted in part of immoveable properties. On obtaining letters of administration vesting the estate of the deceased in him, the Administrator-General took possession of all the properties belonging to the estate and administered them for over 10 years. He sold some of them and paid off debts and claims. He leased out two shops of the deceased from time to time to tenants and collected the rents and paid the revenue and taxes, and kept them in proper repair and generally managed them as an owner would. The properties were entirely under his control during the period of administration. Administration having been completed the Administrator-General was directed by the Court to hand over the two shops to the heir. On a claim by the Administrator-General to a 5 per cent. commission on their estimated value under S. 52 of Act II of 1874, *held*, that the two shops were "assets collected and distributed in due course of administration" by the Administrator-General within the meaning of S. 52, cl. (2) of Act II of 1874 and that he was entitled to a 5 per cent. commission on their market value.

The word "assets" in S. 52 includes both moveable and immoveable property.

The Administrator-General does not earn a commission by merely taking out letters of administration and thereby getting the legal right to deal with the properties, if he does not do anything more. In each case the question whether assets have been "collected" or not has to be decided on its own particular facts. It is not possible to lay down general rules.

On appeal from the order of the Hon'ble Mr. Justice Srinivasa Aiyangar, dated the 1st September, 1925, and passed in the exercise of the Original Testamentary Jurisdiction of the High Court in O. P. No. 36 of 1910 in the matter of the Administrator-General's Act (III of 1913).

N. Chandrasekhara Aiyar and *P. Sankaranarayana Aiyar* for appellant.

The Administrator-General of Madras for respondent.

The Court delivered the following

Krishnan, J.

JUDGMENTS :—*Krishnan, J.* :—The question for decision in this appeal relates to the commission payable to the Administrator-General. The estate he was administering in the present case consisted in part of immoveable properties. Administration having been completed he has been directed by the Court to hand over the two shops in question here to

*O S Appeal No. 98 of 1925. 16th April, 1926.

Seetharama Chetty v. Administrator-General of Madras.

Krishnan, J.

the heir. He claims a 5 per cent. commission on their estimated value under S. 52 of Act II of 1874, that Act being admittedly the governing Statute. The heir-at-law, the appellant, denied the claim and has appealed to us against the order of the learned Judge on the Original Side allowing it.

On obtaining letters of administration vesting the estate of the deceased in him, the Administrator-General took possession of all the properties belonging to the estate and has been administering them for over 10 years now. He sold some of them and paid off debts and claims. He leased out the two shops now in question from time to time to tenants and collected the rents and paid the revenue and taxes, and kept them in proper repair and generally managed them as an owner would. The properties were entirely under his control during the period of administration and he is now prepared to hand over the shops to the heir-at-law. The question is whether in these circumstances the shops can be held to be "assets collected and distributed in due course of administration" by the Administrtor-General within the meaning of S. 52, cl. (2) of Act II of 1874 and whether the Administrator-General is entitled to a 5 per cent. commission on their estimated value.

Assets may consist of both moveable and immoveable properties. The definition of the word in S. 3 of the Act, last clause, makes this quite clear. Assets have been defined as "the property of a deceased person chargeable with and applicable to the payment of debts and legacies" by sale in *In the goods of Courjon* (1). The properties in question here are certainly assets of the deceased as they belonged to him. Section 52 refers to all kinds of assets including immoveable assets for there is no restriction in it as there is in S. 18 which speaks of "moveable assets". The shops are, therefore, assets within the meaning of S. 52.

The question then is, have they been "collected and distributed" by the Administrator-General. There is no difficulty about the word "distributed" for they will be distributed when the Administrator-General hands them over to the heir-at-law. But it is contended that they cannot be said to have been "collected" by the Administrator-General. In fact the argument is that the term "collected" cannot properly be applied to immoveable property; it is said you cannot properly speak of collecting lands and houses. But the expression in the Act is "collecting assets". It is not very clear what the expression connotes when such assets are immoveables;

1. (1897) I L R 25 C 65 at 73.

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there is no clue in the Act to its exact meaning. Some authorities have however been cited to us which I shall now consider.

The first case cited is *In the goods of Simpson* (2). It was ruled in it by Scotland, C. J., that under S. 27 of Act VIII of 1855 (corresponding to S. 52 of Act II of 1874) the word "assets" included leaseholds as well as cash and Government promissory notes and that "collection" did not necessarily imply realisation by sale or by actual receipt or possession. The learned Chief Justice held that the Government promissory notes were collected as soon as they were taken possession of just like Bank notes, as they could be sold in the market and readily converted into cash. Bittleston, J. expressed a doubt on this point but nevertheless agreed to the order. As regards leaseholds which were the only immoveables in the case the learned Judges held that though the Administrator-General had got the title deeds in his possession, he had not brought himself fairly within S. 27 and they disallowed commission to him in the exercise of their discretion under S. 22 as he had done nothing further.

This case was quoted and followed by Sale, J., in *In the goods of Courjon* (1) already cited above. The learned Judge points out that in the Madras case it was implied that to apply the term 'collection' "the doing of some act in connection with the assets whereby the Administrator-General incurred trouble or expense or responsibility" was necessary and as in the case before him the property was in possession of a patnidar and all that the Administrator-General did was to collect the rents he could not be given a commission on the value of the property but only on the rents collected.

The question arose again in *Watkins* v. *Sarat Chunder Ghose Moulick* (3) where commission calculated on the value of the corpus of the testator's estate was claimed but refused to the Administrator-General on the ground that possession was with a Receiver appointed by Court and not with the Administrator-General who only received such sums as the Receiver paid. Their Lordships held that though the estate vested in him the Administrator-General could not be said to have "collected" the estate.

These authorities show that the Administrator-General does not earn a commission by merely taking out letters of administration and thereby getting the legal right to deal with

1. (1897) I L R 25 C 65. 2. (1863) 1 M. H C R 171.
3. (1904) I L R 31 C 572.

the properties, if he does not do anything more. It seems to me that in each case the question whether assets have been "collected" or not has to be decided on its own particular facts. It is not possible to lay down general rules. On the facts of the present case I am inclined to think that there has been "collection" of the assets including the two shops and there will be distribution on the delivery over of the shops to the heir-at-law. The Administrator-General is therefore in my opinion entitled to his 5 per cent. commission on their market value as well. The appeal is dismissed with costs.

Seetharama Chetty v. Administrator-General of Madras. — Krishnan, J.

Venkatasubba Rao, J. :—The point to be decided in this appeal is: What constitutes under S. 52 of the Administrator-General's Act (II of 1874) collecting of assets with reference to immoveable property? It has been contended by the Administrator-General that under the Act commission is payable to him when he gets legal control over the estate. To take a concrete case: a man dies possessed of immoveable property of great value; the Administrator-General obtains Letters of Administration and does nothing more and finds himself in a position to exercise without question acts of ownership over that property: in such a case he contends he is entitled to his 5 per cent. commission. This argument is clearly opposed to authority. "Assets" includes immoveable as well as moveable property (*see* S. 3). When it is intended to confine assets to moveable property only, the expression that is used in the Act is "moveable assets" (*see* S. 18). It is therefore clear beyond doubt that the word "assets" in S. 52 includes both moveable and immoveable property. What constitutes collecting of immoveable assets has been the subject of some decisions. In *In the goods of Simpson* (2) dealing with leaseholds, Scotland, C. J., observed:—

Venkatasubba Rao, J.

"With regard to the leaseholds I think the claim to commission is not brought fairly within the provisions of the 27th section. What 'expense' or 'trouble' has the Administrator-General incurred in reference to these leaseholds? The evidence shows that all he did was to take the title-deeds which were handed over to him. He incurred no 'responsibility' by so doing."

It may be observed that S. 27 of Act VIII of 1886 which was then under consideration corresponds to S. 52 of Act II of 1874.

In the goods of Courjon (1) the testator was entitled to a certain Zemindari property which he had leased in perpetuity, the lessee or patnidar being in possession subject to payment of a fixed rent. Sale, J., accepted the test laid down by Scotland, C. J., in the Madras case and held:

1. (1897) I L R 25 C 65. 2. (1865) 1 M H C R 171.

Seetharama Chetty v. Administrator-General of Madras.

Venkatasubba Rao, J.

"But as regards the rest or corpus of the Zemindari property the Administrator-General has not, it would appear, done any act which would constitute it an asset collected by him."

The Administrator-General was not allowed commission in respect of this portion of the estate.

In *Watkins* v. *Sarat Chunder Ghose* (3) commission was claimed on the value of the corpus of the testator's share in a joint estate of which the Receiver was in possession. It was decided by a Bench of three Judges that the Administrator-General was not entitled to commission. Maclean, C. J., observed:

"It would, I consider, be straining the language of the section to say that he had 'collected' this asset. I do not see how he can successfully say so."

The language of the section is unhappy and is calculated to create much difficulty. However that may be, there is, as I have shown, considerable authority for the position that the Administrator-General's argument is untenable.

The point whether assets have been collected within the meaning of the section is treated in each case, as a question of fact, in the rulings to which I have referred.

I am free to confess that I find it difficult to accept some of the reasoning adopted in these cases, but I am not willing to treat these authorities as not binding. On the facts of the present case, I am not satisfied that the learned Judge is wrong in his view that there has been "collection" under the section. In the result, the appeal fails and is dismissed with costs.

A. S. V. *Appeal dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE SPENCER AND MR. JUSTICE RAMESAM.

Ponnaia *alias* Arulanandudayan and others ... *Appellants** (*Plaintiffs*)

v.

The Right Hon'ble the Secretary of State for India in Council through the District Collector of Ramnad at Madura ... *Respondent* (*Defendant*).

Ponnaia v. Secretary of State for India.

Land Acquisition Act (I of 1894), *S.* 6(1), *proviso—Public revenues—Compensation to be paid out of—Provision for—Compliance with—What amounts to—*

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*Appeal No. 165 of 1925. 16th April, 1926.

3. (1904) I L R 31 C 572.

Evasion of provision—One anna paid by Government out of compensation money, balance of Rs. 5,000 and odd paid by private individual into Government treasury if amounts to—Effect on validity of land acquisition proceedings—Public revenues—Money paid by private individual when becomes—Land acquisition proceedings—Legality of—Strict compliance with provisions of Act—Necessity—Proceedings a mere device for gratification of private spite or malice—Effect—Public purpose—Construction of public road if a—Public nature of purpose—Evidence—Declaration in Gazette—Effect—S. 6 (3) of Act.

If the proceedings of the Land Acquisition Act are not strictly complied with, but are made a cloak for attempting to obtain a transfer of an indefeasible title under the guise of a public purpose, the proceedings do not operate towards the creation of a valid title to the land in Government.

The Legislature, when they passed the Land Acquisition Act, did not intend that owners should be deprived of their ownership by a mere device of private persons employing the Act for private ends or for the gratification of private spite or malice.

The condition in the proviso to S. 6 (1) of the Land Acquisition Act of 1894 that the compensation to be awarded for the property declared to be needed for a public purpose is to be paid, wholly or partly, out of public revenues is not satisfied by payment of a particle. A payment by Government of one anna out of a sum of Rs. 5,352-5-0 (the compensation to be awarded for the land acquired) is a mere evasion of the provisions of the proviso to S. 6 (1) of the Act.

Government, or a Local Body, like the District Board, might receive contributions from private individuals and might spend the same upon public purposes. Such gratuitous contributions may be included in and become part of the public revenues within the meaning of the proviso to S. 6 (1) of the Act.

Under S. 6 (3) of the Act the declaration in the Gazette is conclusive evidence of the fact that the land is needed for a public purpose. After such a declaration, it is not open to the owner to contend in any Court that the land was not needed for a public purpose.

The construction of a public road is *prima facie* a public purpose.

The plaintiffs sued for a declaration that the acquisition of their land for the ostensible purpose of making a new road was illegal, void and not binding on the plaintiffs. The plaintiffs contended that the land acquisition proceedings were not valid and *bona fide* but were undertaken at the instigation of one *K* with whom the plaintiffs had a dispute at law as to the ownership of the land in question, in order by indirect means to deprive them of the land, that there was no necessity for diverting the course of the existing road instead of repairing it, and that the contribution from provincial revenues of one anna out of the total sum of Rs. 5,985 required for the acquisition was an indication of the illusory character of the object for which the provisions of the Act had been made use of.

It was admitted that neither the District Board nor the Taluq Board within whose jurisdiction the land in question was situated proposed to construct the road in question. There was no evidence that any road fund to which private contributions were invited was started and managed by the District or Taluq Board. It appeared that *K* paid the whole of the sum required for compensating the tenant in occupation of the land into Treasury before the notification by Government, and that he paid the whole of the amount awarded as compensation to the owner of the melwaram or landlord's interest after the notifica-

tion *minus* one anna contributed by Government. The amounts so contributed by *K* were deposited in Court under S. 31 of the Act. It was urged that those amounts became merged in the general revenues, and that thus the compensation became payable out of public revenues, as required by the first part of the proviso to S. 6 (1) of the Act.

Held, overruling the contention, that the amounts paid by *K* did not become part of the public revenues within the meaning of the proviso, that the payment by Government of one anna out of the compensation money was a mere evasion of the law, and that the proceedings were therefore illegal and void.

When money is paid into a Government Treasury by the hand of one private individual and after passing intact through the treasury is paid out into the hand of another private individual it cannot with any accuracy be described as becoming part of the public revenues.

Appeal against the decree of the Court of the Subordinate Judge of Sivaganga in O. S. No. 64 of 1922.

S. Srinivasa Aiyangar and *V. Ramaswami Aiyar* for appellants.

The Government Pleader for respondent.

The Court made the following

ORDER:—This suit was brought against Government to obtain a declaration that the acquisition of the plaintiffs' lands for the ostensible purpose of making a new road between Kallal and Managiri in the Ramnad district was illegal, void and not binding on the plaintiffs. It is contended on behalf of the plaintiffs, who are appellants before us, that the land acquisition proceedings were not valid and *bona fide* but were undertaken at the instigation of one Karuppan Chetty, with whom the plaintiffs had a dispute at law as to the ownership of the land in question, in order by indirect means to deprive them of the lands, that there was no necessity for diverting the course of the existing road instead of repairing it, and that the contribution from provincial revenues of one anna out of the total sum of Rs. 5,985 required for the acquisition was an indication of the illusory character of the object for which the provisions of the Act have been made use of.

Mr. S. Srinivasa Aiyangar conceded that the construction of a public road was *prima facie* a public purpose, but he argued that the provision of S. 6 of Act I of 1894 that the compensation should be paid wholly or partly out of public revenues was intended to be a test of the good faith of Government and that a payment of about 1|90,000th part of the amount was not a real and *bona fide* compliance with the terms of the section. He could not contend that the land was not needed for a public purpose because S. 6, cl. (3) enacts that

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the declaration in the Gazette is conclusive evidence of the fact, and it was held by the Privy Council in *Wijevesekara* v. *Festing* (1) that, after such a declaration, it was not open to the owner to contend in any Court that the land was not needed for a public purpose. The Amending Act 38 of 1923, passed after the institution of this suit, contains an additional safeguard that any person interested in any land which has been notified may present an objection in writing to the Collector, upon which an enquiry has to be made and the case reported to the Local Government, whose decision upon the objection shall be final. The Subordinate Judge, who tried the suit, held upon the first issue that the Act did not require that a substantial part of the compensation should come out of public revenues and that, no matter how small the contribution might be, the requirements of S. 6 would be satisfied. We are unable to accept this as a correct view of the law. We consider that the Legislature when they provided that a part of the compensation should be paid from public revenues did not mean that this condition would be satisfied by payment of a particle. In *Chatterton* v. *Cave* (2) (a copyright case) the House of Lords were averse to putting such an interpretation on the words "or part thereof" occurring in the Dramatic Copyright Act, 3 and 4 of William IV, as would make a part to mean a particle. Their Lordships observed that the words in the statute must receive a reasonable construction and were to be treated as implying some part that was substantial and material. We think that the Legislature, when they passed the Land Acquisition Act, did not intend that owners should be deprived of their ownership by a mere device of private persons employing the Act for private ends or for the gratification of private spite or malice. The Government Pleader informed us that the defendant was prepared to prove that a substantial contribution was made towards the cost of the new road and that it was paid into the public Treasury for that purpose. He referred us to Ex. I, which is a proceeding of the Collector directing the Tahsildar to collect the full amount of melwaram compensation from the Chetty, which may or may not be evidence that the sum that represented the reduction of peishkush due by the Sivaganga Estate to Government was collected from a private person and paid into the public revenues. Mr. Srinivasa Aiyangar was not prepared to deny that Government, or a Local Body like the District Board, might receive contributions from private individuals and might

1. (1919) A C 646. 2. (1878) 3 A C 483.

Ponnaia v. Secretary of State for India.

spend the same upon public purposes, such as hospitals, schools or roads. Such gratuitous contributions may be included in and become part of the public revenues. Section 6 itself makes mention of funds controlled or managed by a local authority. In *Veeraraghavachariar* v. *The Secretary of State* (3) in which the legality of certain land acquisition proceedings was questioned in second appeal before Devadoss, J. there was a finding of fact that the cost of acquiring a site for Panchamas' houses was met out of public revenues. In the present case, no Government Official has been examined as a witness to prove from what source the costs of acquisition was met, and whether any money was collected from private sources and paid into the treasury, and, if so, upon what terms the money was made over to Government, and whether it became the money of Government under their complete control to be expended as they might deem fit on a public purpose such as that of improving a public communication by making a fresh alignment of an existing road. As the Lower Court dismissed the plaintiffs' suit upon a technical point which did not completely answer their contention that the acquisition was illegal, the Subordinate Judge will be directed to take such fresh evidence as either side may adduce to prove that the compensation paid in this case came wholly or partly out of public revenues, the allegation of the plaintiffs being that the Chetties kept the money required for the cost of acquisition with themselves, and the allegation of the defendant being that a fund was raised for a public purpose, which became part of the public revenues and was under the control either of the District Collector or the District Board. The Subordinate Judge will return his finding upon this point together with the evidence recorded by him within one month after the re-opening of this Court after the summer vacation ; and the parties will be at liberty to file objections to the said finding within ten days after notice of the return of the same shall have been posted up in this Court.

In compliance with the order contained in the above judgment the Subordinate Judge of Sivaganga submitted the following

FINDING :—The issue on which a finding has been ordered by the High Court to be submitted is "Whether the compensation paid in this case came wholly or partly out of public revenues." The precise points to be determined have

3. (1924) 48 M L J 204.

been indicated in the order of their Lordships and the respective cases of the parties have also been stated in it. As regards the former, they have been indicated in the following sentences :—

"Mr. Srinivasa Aiyangar was not prepared to deny that the Government or a Local Body like the District Board might receive contributions from private individuals and might spend the same upon public purposes, such as hospitals, schools or roads. Such gratuitous contributions may be included in and become part of the public revenues. In the present case no Government Official has been examined as a witness to prove from what source the cost of acquisition was met, and whether any money was collected from private sources and paid into the treasury, and,if so,upon what terms the money was made over to Government, and whether it became the money of Government under their control to be expended as they might deem fit on a public purpose, such as that of improving a public communication by making a fresh alignment of an existing road."

The cases of the parties have been indicated in the following sentence :—

"The Subordinate Judge will be directed to take such fresh evidence as either side may adduce to prove that the compensation paid in this case wholly or partly out of public revenues, the allegation of the plaintiffs being that the Chetties kept the money required for the cost of acquisition with themselves, and the allegation of the defendant being that a fund was raised for a public purpose which became part of the public revenue and was under the control either of the District Collector or the District Board."

The facts which appear from the evidence that has now been adduced are these :—The present plaintiffs instituted a suit against Karuppan Chetty in the Sivaganga District Munsif's Court on 25th August, 1921, alleging that the latter was making a new metalled road from Kallal to Managiri and that he had destroyed the *varagu* crops standing on the lands specified in Sch. A attached to the plaint, a copy of which is marked as Ex. A and was making a road in those lands and that he was about to continue that road in the other lands mentioned in the plaint and praying that he should be restrained by a permanent injunction from doing so. Along with the plaint, they filed an application for a temporary injunction on the same date and obtained a provisional injunction restraining Karuppan Chetty from proceeding with the work of the construction of the road. (This provisional injunction was made absolute by the Sivaganga District Munsif's Court on 21st December, 1921, *vide* Ex. A-1). On 4th September, 1921, Karuppan Chetty sent an application to the Collector of Ramnad, through the Estate Collector of the Sivaganga Zemindari, praying that the lands might be acquired under the Land Acquisition Act as needed for a public purpose (Ex. B). The Estate Collector forwarded the application to the Collector

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and in doing so recommended the acquisition observing that the road from Kallal to Managiri formed part of a large programme of road works drawn up by his predecessor-in-office and submitted to the Court of Wards and generally approved by the Court of Wards and that the work of the construction of the road was progressing very well until the village of the present plaintiffs was reached and the residents of that village objected to the road being made through their lands (Ex. VI). On the report of the Collector referred to in it, the Government made an order approving the draft notification proposed by the Collector to be published in the Gazette that the lands were required for a public purpose and should therefore be acquired under the Land Acquisition Act and ordered that a contribution of one anna should be made from the Provincial funds and the compensation to be awarded for the melwaram right collected from the Chetty and the Collector should follow the procedure laid down in G. O. No. 2325, Revenue, dated 21st October, 1921 (Ex. I). Under that order of the Government, the Collector ordered the Revenue Divisional Officer of Devakotta to collect the full amount of melwaram compensation from Karuppan Chetty and take further action at once, and sent a copy of his order to the Estate Collector of Sivaganga requesting him to see that Karuppan Chetty deposited the amount of *melvaram* compensation without delay, so that the acquisition might be made at once (Ex. II). The Revenue Divisional Officer, Devakotta, sent a telegram (Ex. II-A) to Karuppan Chetty asking him to pay Rs. 3,352-5-0 in the Tiruppatur Sub-Treasury specifying it as the cost of acquisition of Kallal-Managiri road, and Karuppan Chetty deposited the amount into the Treasury (Ex. II-B) and reported the fact to the Revenue Divisional Officer, Devakotta (Exs. II-C and II-D) and paid also the *melvaram* compensation payable to the Sivaganga Zemindary (Exs. II-E and II-F). The notification that the lands were required for a public purpose was made in the Ramnad District Gazette (Ex. III) and notices were issued under S. 10 of the Land Acquisition Act (Exs. IV and IV-A). The subsequent events which have not been disputed were that the Land Acquisition Officer passed an award and referred the claims of the present plaintiffs to the District Court.

It has been argued on behalf of the plaintiffs that the defendant's case at the time of the original trial of this suit was only that the contribution of one anna ordered by the

Government to be made from the provincial funds was a sufficient compliance with the proviso in S. 6 of the Land Acquisition Act, and that the present case, that the amount paid by Karuppan Chetty into the treasury for the purpose of being paid as compensation for the lands acquired was a contribution received by Government for a public purpose and was under their control, is an afterthought. The learned vakil for the defendant has referred to para. 4 of the defendant's written statement and urged that the present case was put forward in that paragraph, but was not availed of because my learned predecessor who disposed of the suit was of opinion that the contribution of one anna was sufficient. Whether it was originally the defendant's case or not, the present contention of the defendant, that the amount paid by Karuppan Chetty into the treasury was a contribution made by him and received by Government for a public purpose and was under their control, has been allowed by their Lordships of the High Court to be raised and I have been asked to try whether it is true. Therefore it is unnecessary for me to consider whether it formed part of the defendant's case as put forward originally in this Court.

Going now to the question to be decided, it is seen from Ex. II-B that the amount of compensation payable to the owners of the *kudivaram* in the lands to be acquired for the road in question was paid by Karuppan Chetty into the Tiruppatur Sub-Treasury on 14th November, 1921, before the notification was published in the Gazette, and from Exs. II-E and II-F that the amount payable to the Sivaganga Zemindary as compensation for the *melvaram* was paid by him into the same treasury on 10th April, 1922 and 2nd June, 1922. From all these documents themselves, it may be held that the allegation of the plaintiffs, that the Chetties kept the money required for the cost of acquisition with themselves is not true, and that the cost of acquisition was met with the amounts paid into the treasury by Karuppan Chetty. The learned vakil for the plaintiffs has, however, maintained that the issue cannot be decided against them and in favour of defendant on those facts alone and argued that the petition of Karuppan Chetty, Ex. B, itself saying that he has bound himself to the Court of Wards to construct the road at his cost and had given an agreement in writing that he would pay the full value of the lands *plus* 15 per cent. to the owners and agreed to abide by the valuation arrived at by the Estate Collector and the letter of the Estate Collector, Ex. VI, stating that subscriptions

had been collected to the extent of nearly 2 lakhs of rupees from Karuppan Chetty and those resident in and round Kallal for constructing the road extending from Paganeri to Kallal and Managiri and that the fund of two lakhs of rupees not having been even alleged to have been paid into the treasury and placed at the absolute disposal of the Government by Karuppan Chetty, it should be held that the fund raised for the purpose of the acquisition in question was in fact kept by Karuppan Chetty himself and not placed under the disposal of the Government, and that the circumstances that he paid the amount into the treasury for being paid out to the owners of the *kudivaram* would not justify the conclusion that it was a contribution made by him for the purpose of the acquisition and was placed at the absolute control of the Government. The learned vakil for the defendant has answered that the receipts, Exs. II-B, II-E and II-F, clearly show that the amount was paid by Karuppan Chetty into the treasury unconditionally, though specifying the object for which it was paid, and that plaintiffs not having adduced any evidence that he attached any conditions to the payment, it should be found that the amount was a voluntary contribution received by Government for a public purpose. The fund of two lakhs of rupees which the Estate Collector has stated in Ex. VI as having been collected by way of subscriptions was for the purpose of the entire cost of the construction of the road Paganeri-Kallal-Managiri. The amount in question is only that which was paid as compensation for the lands acquired for the Kallal-Managiri road. That amount was made over to Government by Karuppan Chetty for being paid as compensation for those lands without imposing any terms or conditions. The only conclusion to be arrived at from the documents is, in my opinion, that the amount became the money of the Government under their complete control, though paid by Karuppan Chetty with the object specified and the issue should be found in the affirmative.

If the question of the *bona fides* of the Government is one for consideration in deciding this issue, reference has to be made to Exs. A, A-1 and A-2 and B on plaintiffs' side and to Ex. VI on the defendant's side. On Exs. A to A-2 and B the learned vakil for the plaintiffs has asked me to come to the conclusion that the acquisition proceedings were started by Government, not *bona fide*, but at the instigation of Karuppan Chetty; and that he instigated the Government to take those proceedings because plaintiffs had filed the suit mentioned above and obtained a provisional injunction restraining him

from proceeding with the work of construction of the road through their lands. The learned vakil for the defendant has urged that it should not be held even Karuppan Chetty was influenced by any sinister motive of merely depriving the plaintiffs of their lands under the pretence of making a road and much less that the Government started the acquisition proceedings not *bona fide*, but at his instigation and to help in the accomplishment of his evil design, because it is seen from Ex. IV that the road in question formed part of a large programme proposed by Mr. Shield and approved by the Court of Wards and that Karuppan Chetty representing himself and residents of the neighbouring places had agreed to construct the road in question at his own cost and actually constructed a portion of it before plaintiffs filed their suit. Ex. VI clearly shows that Karuppan Chetty did not commence the work of construction of the road in question merely to spite the present plaintiffs, and it is seen from the evidence of the Revenue Inspector who has been examined as defendant's witness that the length of the road is about 7 miles and the plaintiffs' lands cover only 4 or 4 1|2 furlongs out of that length. Ex. A itself says that Karuppan Chetty had constructed a portion of the road. It cannot, in my judgment, be held that the Government did not start the acquisition proceedings *bona fide*, or even that Karuppan Chetty did not commence the construction of the road *bona fide*. I agree with the learned vakil for the defendant that the Government cannot be held to have been instigated by Karuppan Chetty to start the land acquisition proceedings, but only moved by him to take action and hold further that though he moved Government just on the date of Ex. B because plaintiffs had filed their suit he did not do so merely to deprive plaintiffs of their lands. For the above reasons I find the issue in the affirmative.

After the return of the above finding from the Lower Court the Court delivered the following

Spencer, J.

JUDGMENTS :—*Spencer, J.*:—Before calling for a finding as to the facts connected with the payment of compensation for the property concerned in this appeal, I stated my reason for considering that a payment by Government of one anna out of a sum of Rs. 3,352-5-0 was a mere evasion of the law which requires that before a declaration can be legally made that any particular land is needed for a public purpose, the compensation to be awarded must either be paid by a company or wholly or partly out of public revenues or some fund con-

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trolled or managed by a local authority. In a case where land has to be acquired for a company the Act permits the whole of the cost of acquisition being met out of the funds of the company, and all that is required by S. 40 of Act I of 1894 is that the Local Government should be satisfied upon an enquiry made by an officer appointed by them that the acquisition is needed for the construction of some work which is likely to prove useful to the public. The present acquisition was not made at the instance of any company. It now transpires that there was here no fund controlled or managed by a local authority out of which the cost of acquisition was to be met, if we understand the words "local authority" as defined in S. 3, cl. 28 of the General Clauses Act, to denote a Municipal Committee, District Board or other authority entrusted by the Government with the management of a Municipal or Local Fund.

It is of no consequence for deciding the question before us that under S. 60 of the Madras Local Boards Act (XIV of 1920) all public roads in the Ramnad District Board or the Taluq Board and that after the new road is formed, the cost of its upkeep will come out of local funds. The defendant admitted in his written statement that the President of the District Board informed the plaintiffs that neither the District Board of Ramnad nor the Taluq Board of Devakottah proposed to construct the road in question. The only witness examined after the remand did not state that any road fund to which private contributions were invited was started and managed by the District or Taluq Board. The Government Pleader does not contend that the present case falls under the last part of the proviso to S. 6 (1) of Act I of 1894, but he maintains that when Karuppan Chetty paid the whole of the sum required for compensating the tenant in occupation of the land into the Treasury before the notification by Government and when he paid the whole of the amount awarded as compensation to owner of the *melvaram* of landlord's interest, represented in this case by the Estate Collector of the Sivaganga Zemindari estate, after the notification, *minus* one anna contributed by Government, those amounts became merged in the general revenues, and that thus the compensation became payable out of public revenues, as required by the first part of the proviso to S. 6 (1) of the Act. He also relies on the circumstance that the money so contributed was deposited in Court under S. 31, as the persons interested refused the compensation tendered to them; and he points out that, if the amount award-

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ed is increased by the District Court, Government will have to make good the difference and Karuppan Chetty would likewise possess no right to any portion of the amount which happened to be left unspent or unclaimed.

In my opinion when money is paid into a Government Treasury by the hand of one private individual and after passing intact through the Treasury is paid out into the hand of another private individual it cannot with any accuracy be described as becoming part of the public revenues. Government had no absolute disposing power over it and could not without a gross breach of trust make any other use of it than by utilising it for the purpose for which the contributor intended it to be used, namely, as compensation for the surrender of the lands acquired. This money was not revenue due to Government on any land, nor was it any cess, tax, duty, custom or other due recoverable under Act II of 1864. It appears clear to my mind that if the provisions of the Land Acquisition Act are not strictly complied with, but are made a cloak for attempting to obtain a transfer of an indefeasible title under the guise of a public purpose, the proceedings do not operate towards the creation of a valid title to the land in Government, as it was held by the Privy Council in *Luchmeswar Singh* v. *Chairman, Darbhanga Municipality* (4).

I would therefore allow the appeal and give the plaintiff a decree as prayed for with costs here and in the Lower Court. Under S. 82, Civil Procedure Code, Government will have two months' time for satisfying the decree

Ramesam, J. :—I agree. Ramesam, J.

A. S. V. *Appeal allowed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE PHILLIPS AND MR. JUSTICE MADHAVAN NAIR.

Omayachi by authorised agent Meenakshisundara Aiyar ... *Appellant** (*Petitioner—Petitioning creditor*)

v.

O. S. Ramachandra Aiyar .. *Respondent* (*Official Receiver, West Tanjore*).

Omayachi v. Ramachandra Aiyar.

Succession Certificate Act, S. 4—Applicability—Official Receiver—Payment of dividend to scheduled creditor by—Section if applicable to.

*A A O No. 394 of 1924. 18th March, 1926.

4. (1890) I L R 18 C 99 (P C).

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Under S. 64 of the Provincial Insolvency Act a creditor entered in the schedule is entitled to be paid his dividend out of the assets of the insolvent, and S. 4 of the Succession Certificate Act is not applicable to such payments, because it is only applicable to decrees or orders for the payment of debts.

Appeal against the order of the District Court of West Tanjore dated 4th November, 1924, in I.A.No. 391 of 1924 in I. P. No. 12 of 1922.

T. M. Krishnaswami Aiyar and *V. Ganapathi Aiyar* for appellant.

M. S. Ramachandra Aiyar for respondent.

The Court delivered the following

JUDGMENT :—This is an appeal against an order of the District Judge confirming an order of the Official Receiver requiring a succession certificate from the appellant before payment of her claim. Under S. 64 of the Provincial Insolvency Act a creditor entered in the schedule is entitled to be paid his dividend out of the assets of the insolvent, and S. 4 of the Succession Certificate Act does not appear to be applicable to such payments because it is only applicable to decrees or orders for the payment of debts. In the Civil Procedure Code of 1882, the framing of the schedule under S. 352 was deemed to be a decree in favour of the creditors as held in *Arunachala* v. *Ayyavu* (1), but in the Insolvency Act of 1907 and the later Act of 1920 there is no such provision. Consequently, it would appear that S. 4 of the Succession Certificate Act is not applicable to the payment of dividends by the Receiver. This is only natural, for in paying out the debts due by the insolvent the Receiver has always to investigate the claims and adjudicate upon them. The claim has been proved and no other person has come forward to claim the same debt. The adjudication of the Receiver is sufficient protection to the estate of the insolvent, for no further creditor can come in to prove against the insolvent's estate. We must therefore set aside the order of the Official Receiver and allow this appeal with costs.

The Official Receiver will pay the dividend to the appellant and also interest at 6 per cent. for the period it has been withheld.

A. S. V. *Appeal allowed.*

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1. (1884) I L R 7 M 318.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—SIR VICTOR MURRAY COUTTS TROTTER, *Chief Justice,* AND MR. JUSTICE RAMESAM.

N. M. Rayalu Aiyar, Nagasami Aiyar and Company by one of its partners N. M. Nagaswami Aiyar ... *Appellants* in Appeal No.* 334 *of* 1924 *(Pltff.)*

v.

S. S. Ramudu Aiyar and another ... *Respondents in Appeal No.* 334 *of* 1924 *(Defts.)*.

Rayalu Aiyar *v.* Ramudu Aiyar.

Civil Procedure Code (V of 1908), O. 2, R. 2—Two suits presented on the same day and numbered consecutively—Suit bearing the later number whether one "afterwards" launched—Right of plaintiff to elect which of the two suits should be held to be barred.

Where two suits were presented together on the same day and an officer of the Court numbered them respectively as 72 and 73:

Held, that the numbering was not *prima facie* evidence of the respective dates of admission and that, even if it was otherwise, it did not determine that the suit bearing the later number was "afterwards" launched within the meaning of O. 2, R. 2, Civil Procedure Code, which contemplates a later proceeding in the real sense.

Held also that the plaintiff may elect as to which of the two suits should be held to be barred by O. 2, R. 2.

Appeals against the decrees of the Court of the Additional Subordinate Judge of Madura dated 6th March, 1924 in O. S. No. 29 of 1921 (O. S. No. 72 of 1921, Madura Sub-Court) and dated 31st January, 1922, in O. S. No. 11 of 1921 (O. S. No. 73 of 1921, Madura Sub-Court).

C. V. Ananthakrishna Aiyar and *P. S. Chandrasekhara Aiyar* for appellants in Appeal No. 334 of 1924.

A. Krishnaswami Aiyar and *P. V. Krishnaswami Aiyar* for respondents in do.

A. Krishnaswami Aiyar and *P. V. Krishnaswami Aiyar* for appellants in Appeal No. 219 of 1922.

S. Doraiswami Aiyar, C. V. Ananthakrishna Aiyar and *V. Thiagaraja Aiyar* for respondents in do.

The Court delivered the following

JUDGMENT:—It will be convenient first to deal with Appeal No. 334. The plaintiffs and appellants before us were the sellers and they had entered into a contract to deliver to the buyers 60 bales of yarn of various counts. They delivered 28 bales before 15th November, 1918 when the controversy between the parties arose. The offer is to be found in a letter of the 27th July, Ex. A accepted by an answer of the 5th August, Ex. II. The terms of the contract are very simple. The bales were to be delivered by the sellers as soon as

*Appeals Nos. 334 of 1924 and 219 of 1922. 17th March, 1926.

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they got them from the Mills which manufactured them and what is called *Tavanai* credit was extended to the buyer. That is explained in this way. The mill month runs from the 21st of one month to the 20th of the next, and the period of credit is to the end of the calendar month following that in which the mill month expired; that is to say, for goods delivered by the mill from the 21st September to the 20th October payment will be due on the 30th of the following November. On the 15th November, the sellers wrote announcing that 9 bales had arrived at the mills and were in stock there and the letter says:

> "If you therefore pay us Rs 2,660 being the balance due for the October *Tavanai* and Rs 21,120 being the balance due for the November *Tavanai*, Rs 23,780 in all, we shall also pay the amount to the mills, take out the bales and deliver them to you."

We see no answer to the contention that that was a bad tender because it did not offer to deliver the goods which were due for delivery unless a condition was complied with which was not in accordance with the original contract. It is clear therefore that there never was at this date any valid tender of the 9 bales. With regard to the remaining 23 bales they were never tendered at all but the sellers' contention is that they were entitled to cancel the balance of the contract in the events which happened and that they did so by their letter of the 22nd January, 1919, Ex. B. It is quite true that in Ex. II we find the position that if payments were not duly made in accordance with the contract there was a provision for cancellation of all the outstanding part of the contract at the sellers' option. Assuming that Ex. B is not merely a threat to cancel but does actually purport to effect a cancellation, we are clearly of opinion that it was not a cancellation which the sellers were entitled to bring about as matters then stood. The demand was to pay first a sum of Rs. 23,780 as to which we will assume for this purpose the money was due but it was coupled with the further demand that 9 bales should be paid for of which up-to-date, as we have found, there had been no valid tender. In these circumstances we agree with the learned Judge that the sellers were never in a position to claim damages for non-acceptance of any one of these 32 bales.

The other appeal, No. 219 of 1922 relates to the price of the 28 bales which the buyers have had and not paid for. They seek to evade payment by invoking the provisions of O. 2, R. 2 of the Code of Civil Procedure. What happened was that the sellers brought two suits, one in respect of the 28 bales as goods sold and delivered and the other in respect of

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the balance of 32 for damages for non-acceptance. A Full Bench of the Calcutta High Court in *Duncan Brothers and Co.* v. *Jecetmull* (1) giving effect to a prior expression of opinion by Wilson J., has held that, though the two causes of action may be legally different, if the goods are all deliverable under one contract you cannot validly split them into two and bring separate suits in respect of them. Assuming this to be correct, the words of O. 2, R. 2 are:

"Where a plaintiff omits to sue in respect of, or intentionally relinquishes, any portion of his claim, he shall not afterwards sue in respect of the portion so omitted or relinquished."

It is said that the doctrine of the Calcutta High Court can be applied to this case by invoking the authority of the decision in *Murti* v. *Bhola Ram* (2). In this case the facts appear to be that the suits were presented together on the same day and an officer of the Court numbered them respectively as 72 and 73, 72 being the suit for damages for non-delivery of the 32 bales and 73 the suit for the price of the 28 bales sold and delivered. The Allahabad case is invoked as laying down the proposition that the numbering affixed by the Court shall *prima facie* be conclusive as to the order of time in which the suits were respectively instituted. We are not prepared to assent to that doctrine but would rather hold that the plaintiffs here can confine themselves to Suit No. 72 and have Suit No. 73 dismissed under O. 2, R. 2. It may very well happen that of two suits presented simultaneously one was held for some technical cause for a week or ten days and then would be numbered several numbers behind the one which was admitted without question. Even if it be that the numbering is *prima facie* evidence of the respective dates of admission, it does not seem to us that it determines that the suit bearing the later number was "afterwards" launched within the meaning of the rule which in our opinion contemplates a later proceeding in the real sense. In any case we prefer to follow the ruling in *Appasami* v. *Ramasami* (3) which clearly contemplates that in a case like the present the plaintiff may elect as to which of two suits instituted by him together on the same day shall be held to be barred by the operation of O. 2, R. 2. This being so, we think the sellers here are entitled to ask that the doctrine if applied should be applied to the suit for damages in respect of the non-acceptance of 32 bales so as to leave

1. (1892) I L R 19 C 372. 2. (1893) I L R 16 A 165 (F B). 3. (1886) I L R 9 M 279.

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their remedy unaffected as to the 28 bales sold and delivered. The result is that both appeals fail and are dismissed with costs.

N. S. —— *Appeals dismissed.*

[FULL BENCH.]

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE SPENCER, MR. JUSTICE KRISHNAN AND MR. JUSTICE BEASLEY.

The Board of Revenue, Madras ... *Referring authority**

v.

Moopanna Somarazu and another ... *Respondents (Persons interested in the decision in this reference).*

F. B.

The Board of Revenue, Madras v. Moopanna Somarazu.

Madras Stamp (Amendment) Act (VI of 1922), Sch. I-A, Art. 33 (a) and (b)—Mortgage deed—Mortgagor to retain possession—Provision to make annual payments—On default mortgagee to enter into possession—Nature of document—Possession given or "agreed to be given"—Meaning of.

A mortgage deed contained a covenant that the mortgagee should permit the mortgagor to retain possession of the property so long as he made the annual payments stipulated in the deed and on default the mortgagee could enter on the premises, possess and enjoy the same. The question was whether the covenant amounted to "possession given or agreed to be given" within the meaning of Art. 33 (*a*) of Sch. I-A to the Madras Stamp (Amendment) Act. *Held,* the words "agreed to be given" did not cover a case where on a breach of covenant, power is reserved for the mortgagee to take possession if he thought fit. Art. 33 (*a*) applies only to cases where by the words of the document possession is directly agreed to be given; and as under the terms of the mortgage deed, possession was to pass only on a certain contingent event happening, the document would fall not under Art. 33 (*a*) but under Art. 33 (*b*) of Sch. I-A to the Act. *Anonymous Case,* (1884) I L R 10 Cal 274 referred to.

Case stated under S. 57 of Act II of 1899, Indian Stamp Act, by the Secretary to the Commissioner of Excise, Triplicane, Madras, in his letter C. R. No. 564 Mis. of 1925 dated 22nd September, 1925 for the decision of the High Court on the question of the stamp duty chargeable on the document which forms an annexure to G. O. No. 1625 (Development, dated 18th September, 1924).

The Advocate-General instructed by the *Government Solicitor* for Referring Authority.

P. V. Rangaram for respondents.

The Court delivered the following

Spencer, J.

JUDGMENTS :—*Spencer, J.* :—The question before us is whether documents, of which we have a specimen form here, are mortgage deeds of the description defined in Art. 33 (*a*), Sch. I-A of the Madras Stamp Act (VI of 1922) in these words :

*R C No. 19 of 1925. 21st April, 1926.

F. B.

The Board of Revenue, Madras v. Moopanna Somarazu.

Spencer, J.

"Mortgage deed.............when possession of the property or any part of the property comprised in such deed is given by the mortgagor or agreed to be given."

In the Stamp Act (XVIII of 1869) the description ran differently. It was a mortgage deed of this class only when possession of property comprised therein was given by the mortgagor at the time of execution. Then in Act I of 1879, the words "at the time of execution" were transposed from the end to the beginning of the sentence and the description ran thus:

"When at the time of execution possession of the property or any part of the property comprised in such deed is given by the mortgagor or agreed to be given."

In the present Act, the words "at the time of execution" have been altogether dropped. Therefore we have only to consider whether possession of the property is either given by the mortgagor or agreed to be given under the document that is before us. The decisions in the *Anonymous case* (1) and *Hinganghat Mill Co., Ltd.* v. *Rekchand Bhikamchand* (2) being decisions upon Acts which are not now in force, serve rather as guides for the interpretation of the present Act than as authorities. The mortgage deed before us is in the form of an English mortgage. The mortgagor gives a certain parcel or piece of land to the mortgagee "have and to hold", "subject to the proviso for redemption" therein contained. Then there is a covenant that the mortgagee shall permit the mortgagor to retain possession of the premises so long as he shall make the annual payments as stipulated, the net result of which is that the mortgagor remains in possession and thus possession is not immediately given by the mortgagor of the property comprised in the deed. But there is a provision at the end of the document providing that, if default is made in payment of certain annual instalments, the mortgagee may at any time thereafter enter into and upon the said piece of land and premises and shall thenceforth quietly possess and enjoy the same. The question is whether this covenant amounts to an agreement to give possession. I think that the main agreement between the parties is that possession should not be given to the mortgagee in the first instance as the result of the execution of the mortgage deed and that this covenant for the mortgagee entering on the property in case of the mortgagor making default in payment is a subsidiary agreement which is only to take effect upon a certain contingent event happening which may never happen. Under these circumstances

1. (1884) I L R 10 C 274. 2 (1884) I L R 8 B 510 (F B).

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Krishnan, J.

I am of opinion that this document is one in which possession is not given or agreed to be given and that it falls under Art. 33 (*b*) of the Act.

Krishnan, J. :—This is a reference by the Board of Revenue for the decision of the High Court the question of the proper stamp duty payable on the document submitted to us. That document is in the form of an English mortgage. The question we are called upon to decide is whether this mortgage falls under Art. 33 (*a*) or 33 (*b*) of the present Madras Stamp Act, Sch. I-A. To make it fall under cl. (*a*) it is necessary that

"the possession of the property or any part of the property comprised in the deed should be given or agreed to be given."

If it does not fall under cl. (*a*) it must fall under cl. (*b*). This question was considered on a reference with regard to a similar document in the *Anonymous case* (1), but under the previous Stamp Act of 1879, Art. 44, Sch. 1. There is a difference in the wording of that Act and the present Act with which we are now dealing. The words "at the time of execution" have been omitted in the present Act. It was held by the learned Judges that the document before them did not fall under cl. (*a*) but only under cl. (*b*). As the Act has been changed, it is no doubt true as my learned brother says that the case cannot be treated as an authority, nevertheless, it is a useful guide as to the construction to be placed upon the Article as it is now worded. The question of what stamp duty is payable on a document must necessarily be decided on the words of the document and the terms it embodies. There can be no doubt that, under the document before us possession is not given by the mortgagor to the mortgagee for by express stipulation the mortgagor is to continue in possession. The covenant with reference to possession is that on a certain event happening, namely, on the mortgagor's default to pay in time the instalments fixed in the document, the mortgagee has the power to sell the property if he so chooses, or to take possession of the property in case he thinks fit to do so. The question then is, whether this document can be treated as a document by which the mortgagor has agreed that possession of the property should be given to the mortgagee within the meaning of cl. (*a*). I am inclined to think that the words "agreed to be given" in cl. (*a*) should not be construed in too wide a sense as the Advocate-General argues but that these words should be restricted in the manner the Judges of the

1. (1884) I L R 10 C 274.

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Calcutta High Court did. Mitter, J., says with reference to these words in cl. (*a*) :

"I am of opinion that cl. (*a*) of Art. 44 covers only those mortgage deeds in which as security for the money advanced on mortgage, possession of the property or any part of the property mortgaged is actually given or agreed to be given. But it does not include mortgage deeds in which it is stipulated that the mortgagee *would be entitled* to take possession of the property, or any portion of the property mortgaged in case there should be any breach of the covenants of the deed. The word 'given' in the clause in question seems to me to point out that only those transactions are intended to be covered where the transfer of possession takes place in consequence of the *agreement on the part of the mortgagor to deliver over* possession as part of the security of the mortgage money. But, where by virtue of a stipulation in the mortgage deed, the mortgagee becomes entitled to enter upon possession quite irrespective of the consent of the mortgagor to make over possession, the clause in question does not apply."

I am inclined to think that this is the proper connotation of the words "agreed to be given". These words do not really cover a case where on a breach of covenant power is reserved for the mortgagee to take possession if he thinks fit. That will be putting too large an interpretation upon the words "agreed to be given." The principle is that in cases where a Taxing Act like the Stamp Act imposes a pecuniary burden upon the subject, the construction most beneficial to the subject should be adopted in cases of doubt. I am therefore of opinion that the words "agreed to be given" should not be construed as covering cases of agreement to give possession on the breach of a certain covenant, or on the happening of a future event which may or may not happen, but only cases where by the words of the document possession is directly agreed to be given. This view is also supported by the judgment of Field, J., in the same Calcutta case. Garth, C. J., takes a slightly different view based upon the words "at the time of execution". But these words are not now in the Act and therefore his judgment is not of much use to us. There is, however, one sentence in it to which I shall draw attention. It expresses forcibly that too large a construction should not be placed upon the words. He says at page 278:

"Again, if the Advocate-General's view were correct, cl. (*a*) would be applicable in all cases where possession of the property is agreed to be given at any distance of time, or under any conditions, even temporarily, for non-payment of interest. I cannot think that the Legislature meant to extend so largely, or so unreasonably, the class of mortgages which are to be chargeable with the higher duty."

There is a further point here and that is, that even if we construe the words "agreed to be given" as covering cases where on the breach of a covenant possession is to be given to

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the mortgagee, such an agreement does not exist here, for here the agreement is not for the mortgagor to give possession but for the mortgagee to take possession if he thinks fit. Such a case does not seem to come under cl. (*a*). This is what Field, J., says on the point,

"Now, although there is an authority to the mortgagees and trustees to take possession upon the happening of certain events, I think it impossible to say that there is any agreement by the mortgagor to give possession."

The mortgagor, on the breach of a covenant, may refuse to give possession and drive the mortgagee to a suit to enable him to enforce the covenant as regards possession. A document that contains such a provision is, I think, not contemplated by cl. (*a*) of Art. 33.

I therefore agree with my learned brother that this document is not a document which falls under cl. (*a*), but under cl. (*b*), and should be stamped accordingly.

Beasley, J.

Beasley, J. :—I agree.

T. S. V. ——— *Reference answered.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE PHILLIPS AND MR. JUSTICE ODGERS.

Appana Prakasa Rao ... *Appellant** (*1st defendant*)

v.

Yelamarti Ramanna and others ... *Respondents* (*Plaintiff and defendants 2 and 6 and nil*).

Appana Prakasa Rao v. Yelamarti Ramanna.

Subrogation—Property subject to a mortgage—Attachment of—Private sale of property pending—Discharge of mortgage by purchaser—Sale of property in execution and purchase by attaching decree-holder—Rights of parties in case of—Private purchaser's right to charge on property for amount paid to discharge mortgage—Civil Procedure Code, S. 64.

The plaintiff took a sale of the suit property after it had been attached by the 1st defendant. He then discharged the encumbrance on the property. The property was subsequently sold and purchased by the 1st defendant.

Held that, as the plaintiff's sale was after the attachment, it was void as against the 1st defendant's interests under S. 64, Civil Procedure Code, but that the plaintiff was entitled to a charge upon the property for the amount paid by him to discharge the mortgage thereon.

Second Appeal against the decree of the Court of the Subordinate Judge of Rajahmundry in A. S. No. 69 of 1922 (A.S.No.11 of 1922 on the file of the District Court, Godavari) preferred against the decree of the Court of the Additional District Munsif of Rajahmundry in O.S.No.146 of 1920 (O. S. No.112 of 1920, District Munsif's Court, Razole).

*S A No. 872 of 1923. 16th December, 1925

G. Lakshmanna and *P. Panini Rao* for appellant.

P. Bapirazu, K. Ramamurthi and *K. Kameswara Rao* for respondents.

The Court delivered the following

JUDGMENTS :—*Phillips, J.* :—The first objection taken by the appellant (1st defendant) is to the Subordinate Judge's finding that the plaintiff paid Rs. 2,000 in discharge of the mortgage, Ex. B, on the ground that the mode of payment proved is at variance with the mode set out in the plaint. It is alleged that the plaintiff put forward the case of cash payment and that the proof was "by adjustment of a debt". There is nothing in the plaint, nor in the sale-deed obtained by the plaintiff to justify the statement that cash payment and cash payment only was intended. The finding therefore must be accepted.

Accepting the finding, it is then argued that the plaintiff is not entitled to be subrogated to the rights of the mortgagee paid off by him. A long argument has been addressed to us as to the rights of a mortgagee and the assignee of a mortgagee to discharge an encumbrance or keep it alive, but in the present case it is unnecessary to enter into that question for the present case is concluded by authority. The facts of this case are very similar to those in *Dinobandhu Shaw Chowdhry* v. *Jogmaya Dasi* (1). In the present case the plaintiff took a sale of the suit property after it had been attached by the 1st defendant. He then discharged the encumbrance on the property. The property was subsequently sold and purchased by the 1st defendant. Inasmuch as the plaintiff's sale was after the attachment it is void as against the 1st defendant's interests under S. 64, Civil Procedure Code, and the plaintiff now only seeks to enforce the mortgage right of Rs. 2,000 which he discharged. In the case in *Dinobandhu Shaw Chowdhry* v. *Jogmaya Dasi* (1) the facts are almost the same except that in that case the owner of the property had executed a second mortgage after the attachment and the consideration for the second mortgage, or a part of the consideration was the discharge of two earlier mortgages. It was held by their Lordships of the Privy Council that a mortgagee was entitled to be subrogated to the rights of the mortgagees who had been paid off. The principle is laid down as follows:—

"When the owner of an estate pays charges on the estate, which he is not personally liable to pay, the question whether those charges are to be considered as extinguished or as kept alive for his benefit is simply a question of intention. The intention may be found in the circumstances attending the transac-

1. (1901) I L R 29 C 154 : 12 M L J 73 (P C).

Appana Prakasa Rao v. Yelamarti Ramanna.

Phillips, J.

tion or may be presumed from a consideration of the fact whether it is or is not for his benefit that the charge should be kept on foot."

Here, undoubtedly it is for the plaintiff's benefit that the charge should be kept on foot, and consequently this decision of the Privy Council is applicable to the present case. I may also mention that that case has been extended to the case of a sale by the Allahabad High Court in *Jamilunnissa* v. *Pitambar Das* (2). The principle has also been followed by this Court in several other cases *Chamaswami* v. *Padala Anandu* (3), *Syamalarayudu* v. *Subbarayudu* (4), etc. The Subordinate Judge was therefore quite right in giving the plaintiff a charge on the property.

It is next contended that the charge should have been given not only on the suit property but on the other property also which was included in the mortgage, Ex. B. The question was not raised in either of the Lower Courts and it is a question which cannot be determined here without further trial. When the plaintiff's lien is enforced against the property in the hands of the 1st defendant it would then be open to the latter to put forward any claims to which he is entitled to for contribution from any other parties.

In the result the appeal is dismissed with costs two sets (Plaintiff and 7th Respondent).

Odgers, J.

Odgers, J. :—I agree that the matter is concluded by the decision in *Dinobandhu Shaw Chowdhry* v. *Jogmaya Dasi* (1) and *Jamilunnissa* v. *Pitambar Das* (2).

A. S. V. —— *Appeal dismissed.*

[FULL BENCH.]

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—SIR VICTOR MURRAY COUTTS TROTTER, *Kt.*, *Chief Justice*, MR. JUSTICE KRISHNAN, AND MR. JUSTICE BEASLEY.

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The Commissioner of Income-tax, Madras v. Mangalagiri Sri Umamaheswara Gin and Rice Factory, Ltd., Guntur.

The Commissioner of Income-tax, Madras ... *Petitioner in both the cases**

v.

Mangalagiri Sri Umamaheswara Gin and Rice Factory, Ltd., Guntur and another ... *Respondents.*

Income-tax Act (XI of 1922), S. 10(2) (vi)—Deduction for depreciation—Rice mill factory—Lease of—Owner to bear the loss due to wear and tear—Deduction—If allowable.

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*R.C.Nos. 4 and 6 of 1925. 23rd April, 1926.

1. (1901) I L R 29 C 154 : 12 M L J 73 (P C). 2. (1915) 18 I C 704.
3. (1908) I L R 31 M 439 : 18 M L J 306. 4. (1897) I L R 21 M 143.

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A limited company was the owner of a mill equipped with plant, machinery and building for milling rice. Under the powers conferred by its Memorandum of Association, the company leased out the mill to a third party at a fixed rent, and the lease deed provided that the lessees were to do the necessary repairs to the mill and hand it back on the expiry of the lease in proper working order, while the lessors were to bear the loss by depreciation due to wear and tear caused by the working of the mill. On being assessed to income-tax the lessors (limited company) claimed a deduction in respect of depreciation under S. 10 (2) (*vi*) of the Income-tax Act. *Held*, as the property depreciated belonged to them and as it was used for the business of letting the buildings and mill machinery, they were entitled to the deduction.

Cases stated under S. 66 (2) of the Indian Income-tax Act (XI of 1922) by the Commissioner of Income-tax, Madras, in the matter of the assessment on the Mangalagiri Sri Umamaheswara Gin and Rice Factory, Ltd., Guntur, and Guntur Merchants' Gin and Rice Factory, Ltd., Guntur.*

The following question was referred to the High Court for decision by the Commissioner :—

"Whether the allowance provided in S. 10 (2) (*vi*) of the Indian Income-tax Act, 1922, is admissible in computing the income of an assessee who has leased out his plant, machinery and buildings?"

The facts giving rise to the same are—

"The assessee in this case—the Mangalagiri Sri Umamaheswara Gin and Rice Factory—is a company incorporated under the Indian Companies Act, 1912. It was registered on the 11th January, 1921, and, according to its memorandum of Association, its objects are:—

(1) To prepare and sell raw rice, boiled rice, cotton, cotton seeds, bran, husk, and

(2) To purchase and lease out buildings, vacant sites and lands.

There is a subsidiary provision in the articles to the effect that, "If it is deemed beneficial to the company with reference to circumstances it may lease or give its factory for contract". In accordance with this provision the company instead of working its mill on its own account leased it out to Messrs. Parapalli Subbarayadu and R. Punniah on 29th March, 1923 for a consideration of Rs. 1,500 per annum. The terms of the lease were that the machinery was to be kept in good working order by the lessee (repairs being executed by him) but that the lessor was to bear the cost of any renewals worth more than Rs. 100, *i. e.*, for practical purposes the lessor was responsible for wear and tear.

For the assessment of the year 1924-25 the company furnished a return of its income to the Income-tax Officer, Guntur. It showed therein that its income during the previous

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year was Rs. 995 and claimed a further deduction of Rs. 1,037 on account of depreciation under S. 10 (2) (*vi*). The Income-tax Officer refused to allow depreciation as, in his opinion, the company was not entitled to this allowance under S. 10 (2) (*vi*), and made the assessment on a taxable income of Rs. 995. The company's appeal to the Assistant Commissioner of Income-tax, Guntur, against the assessment was dismissed on similar grounds.

The company has now asked me to state a case to the High Court under S. 66 (2) of the Income-tax Act. As the question involves the interpretation of S. 10 (2) (*vi*) of the Act read with S. 10 (2) (*iv*), I state the case as framed above.

In my opinion the allowance claimed is not admissible. In order to make an assessee eligible for the allowance under S. 10 (2) (*vi*) two conditions have to be satisfied, namely:—

(1) That the buildings, machinery, plant, etc., in respect of which depreciation is claimed are the property of the assessee [S. 10 (2) (*vi*)] and

(2) That they are "used for the purposes of the business," S. 10 (2) (*iv*). In the present case the first condition is satisfied but the second is not. The machinery and plant in question is not used by the petitioners in their capacity as lessors of the factory but by the firm of Messrs. Parapalli Subbarayudu and R. Punniah who actually carry on the processes of milling in the factory. Before an assessee can claim the benefit of S. 10 (2) (*vi*), it must be clear that he is making the profits by using and causing the wear and tear of the machinery, buildings, plant, etc. In the present case the buildings, machinery, etc., are used by the lessees and the wear and tear is caused for the purpose of earning their profits and not those of the assessee.

I may add that the petitioners in the event of their claim under S. 10 (2) (*vi*) not being admitted urge that in equity they should be given the allowance and pray that it be given under S. 9 (1). In regard to this I need only say that where the legislature has prescribed certain definite allowance and laid down the conditions under which they may be granted, it is not my sphere, nor that of a Court of law, to enquire into questions of equity. The depreciation allowance claimed clearly cannot be granted under S. 9 (1) as that section only relates to "property consisting of lands and buildings appurtenant thereto". The income derived from the lease of machinery plant is not income from property within the meaning of the Income-tax Act."

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Coutts Trotter, C. J.

Ch. Raghava Rao and *A. Sundaram Aiyar* for assessees.
M. Patanjali Sastri for Government.

The Court delivered the following

JUDGMENTS :—*The Chief Justice* :—The assessees in this case are a limited company registered on the 11th January, 1921, which is the owner of a mill equipped with machinery for the milling of rice. The company elected not to work its mill on its own account but leased it out to another firm in consideration of Rs. 1,500 per annum which it is entitled to do under the provisions of its memorandum and articles of association. I think it is clear that the assessees cannot come to Court and ask for deductions on the footing that they are carrying on a business of rice milling. The business they are carrying on is that of lessors of a building which derives its lettable value from the fact that it is equipped with certain machinery which is available for the purpose of milling rice. And of course it is on that lettable value that the lessors have been assessed. It seems to me that this is the not infrequent case of the same building and its contents being taxable both in the case of the lessors and the lessees. Different deductions will be allowable in the case of the lessors and the lessees. The lessors as carrying on the business of letting a rice mill can justly deduct from their assessment any sum which is due to depreciation of the lettable value of the property by reason of wear and tear of machinery which falls upon them under the contract of lease. Similarly the lessees being taxable as carrying on the business of rice-milling will be entitled to a deduction of such repairs as fall upon them under the lease. The Crown does not suffer from the fact that the parties can distribute the incidence of the liability for repairs as they choose, because only one total sum can be allowed as deduction. If that principle be right, it answers the question raised by the case and it is not our function to apportion which deduction can be rightly claimed by the lessors and which by the lessees which is a matter for the Commissioner to work out as a question of fact.

Krishnan J.

Krishnan, J. :—This is a reference under S. 66 (2) of the Indian Income-tax Act (XI of 1922); the question referred for our decision is:

> "Whether the allowance provided in S. 10(2) (iv) of the Indian Income-tax Act, 1922 is admissible in computing the income of an assessee who has leased out his plant, machinery and buildings?" ....

The Commissioner has answered the question in the negative.

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S. 10 (2) (*vi*) is as follows:—

"In respect of depreciation of such buildings, machinery, plant or furniture being the property of the assessee a sum equivalent to such percentage on the original cost thereof to the assessee as may in any case or class of cases be prescribed."

The assessee here is a limited company formed primarily for the purpose of milling rice, and to carry out that object the company had acquired buildings, mill, machinery and plant. They did not, however, carry on that business. There is a provision in the memorandum of association authorising the Directors to lease out the mill to 3rd parties for rent if it is beneficial to the company to do so; acting under this authority the mill was leased out to certain lessees for a fixed annual rent for a period of 3 years. The arrangement was that the lessees were to work the mill and take the profits, and do the necessary repairs to it and hand it back at the end of the period to the lessors in proper working order; the lessors were, however, to bear the loss by depreciation by wear and tear caused by the working of the mill. The company is assessed on the rent received by them. It is clear from the facts that the company was carrying on the business of letting the mill for the purpose of being worked by the lessees.

As very correctly observed by the learned Commissioner of Income-tax two conditions must be fulfilled by the assessees before they become entitled to the deduction claimed for depreciation under S. 10 (2) (*vi*) the property depreciated must belong to the assessees and must be "used for the purpose of the business". The first condition is admittedly fulfilled. But the Commissioner thinks the 2nd is not. I am inclined to think he is not right in that view. The business here is the business of leasing the buildings and mill machinery for being worked as a mill. The rent received is not only for the use of the mill but also to cover the necessary wear and tear. A portion of that rent represents the loss by wear and tear. The lease being of the mill as a working concern it is not straining the language of cl. (*vi*) to hold that the machinery and buildings are used for the purpose of the lease and that the depreciation caused to them by wear and tear arises, so far as the assessees are concerned, from that user. Though the direct cause of the wear and tear may be the working of the mill by the lessees such working is authorised by the lease and is part of the business of the lease. That part of the rent which represents the loss due to depreciation is not really income to the lessors but is meant to make good

the loss on capital value of the machinery. I agree with the learned Chief Justice in holding that the assessees here are entitled to a deduction for depreciation of their buildings, machinery and plants which under the lease they have to bear. What that amount properly is for the year of assessment is for the taxing authorities to find. My answer to the reference on the facts of this case is as stated above.

Beasley, J. :—The only point upon which I had any doubt was whether it could be said that the assessees were themselves carrying on business, because it is not only necessary for an assessee before becoming entitled to the deduction for depreciation under S. 10 (2) (*vi*) of the Act to be the owners of the property in respect of the property depreciated but that also that property must be used for the purpose of the business. There is no doubt of course that the assessees are the owners of the property; but is the property used for the purpose of the business ? This is a case of a limited company formed for the purpose of milling rice and in pursuance of that object the company acquired buildings, mill, machinery and plant. The company is however authorised in the memorandum of association to lease out the mill to other people for rent. The company did not carry on the business of milling rice, it availed itself of the authority given to it of leasing out the mill for a fixed annual rental. The lessees worked the mill and took the profits and under the lease had to do the necessary repairs to the mill. They had not however to bear loss by depreciation by wear and tear and it is in respect of the latter loss that the company claims the deduction under S. 10 (2) (*vi*). The Commissioner of Income-tax has held that the property is not used by the assessee for the purpose of the business, but I agree with the learned Chief Justice and with my brother Krishnan, J. that the view he has taken is incorrect. The company could either work the mill itself or could let it out to others to do so. One is the business of milling and the other is the business of letting out the mill for others to do so. Both, in my view, are equally a business, and my answer, therefore, to the reference would be that the company is entitled to a deduction for depreciation of the buildings, machinery and plant.

Government will pay the assessees in each case Rs. 100 for their costs.

T. S. V. *Reference answered in the affirmative.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE DEVADOSS AND MR. JUSTICE WALLER.

Penumasta Subbaraju ... *Appellant* (Appellant in S. A. No. 1387 of 1921 on the file of the High Court—Plaintiff).*

v.

Indukuri Narayanaraju and others ... *Respondents (Respondents in do.—Defendants).*

Subbaraju v. Narayanaraju.

Indian Contract Act (IX of 1872), S. 23—Opposed to public policy—Compromise in a suit providing that one of the parties should adopt a particular boy—Family settlement—Party gaining no more by adopting than by refusing to adopt under the terms of compromise—Penal clause.

The plaintiff's father who was living in the family of his father-in-law and looking after the cultivation of his properties was given a fourth share about 27 acres of land by the three sons of his father-in-law who effected a partition after their father's death, as if he was a member of their family. The sons of one of these three sons instituted a suit against the plaintiff for the recovery of 9 acres of land on the ground that the granting of a share to the plaintiff by their father was not binding on them To this suit the other members of the family were also made parties. This suit was compromised according to the terms of which the present plaintiff should adopt the son of one of the present defendants within two months from the date of compromise and if he did so he should enjoy the entire property which fell to his father's share and if he should fail to take the boy in adoption he should retain only one-half of the 27 and odd acres and the other half should go to the plaintiffs in that suit. The plaintiff failed to take the boy in adoption and consequently was dispossessed of half the properties in execution of the compromise decree. He brought the present suit for the recovery of these properties on the ground that the compromise is not binding on him as being opposed to public policy.

Held, (1) that the compromise was a *bona fide* family settlement and not opposed to public policy; (2) that the clause in the compromise that the plaintiff should retain one-half of the properties and give back the other half if he failed to adopt the boy was not a penal clause, as, even if he adopted the boy, he would get only one-half for his share, the other half going to his adopted son and thus he would gain no more by adopting than by refusing to adopt

Per Devadoss, J.:—The adoption of a boy is a religious act and is one which is necessary for the salvation of the soul. If a person is asked to adopt a boy by the promise of sufficient means to maintain himself and the boy, the adoption induced by such promise will not be invalid.

An adoption cannot be declared invalid by reason of any collateral arrangement or contract entered into between the adoptor and the adoptee's natural father, for it would do incalculable harm to the adopted boy if the adoption is to be declared invalid by reason of any arrangement between persons over whom he has no control What the law refuses to recognise is the contract or agree-

*L P A No. 111 of 1924. 3rd Mach, 1926.

ment whereby third persons who are not parties to the transaction try to acquire monetary benefit by promoting it.

Subbaraju v Narayanaraju

Appeal under clause 15 of the Letters Patent presented against the judgment of the Hon'ble Mr. Justice Madhavan Nair in S. A. No. 1387 of 1921 preferred to the High Court against the decree of the Court of the Additional Subordinate Judge of Ellore in A. S. No. 21 of 1921 (A. S. No. 351 of 1920 on the file of the Court of the Subordinate Judge of Ellore) preferred against the decree of the Court of the Principal District Munsif of Tanuku in O. S. No. 189 of 1912.

T. M. Krishnaswami Aiyar and *K. Venkatrama Raju* for appellant.

S. Varadachari, P. Somasundaram and *V. Suryanarayana* for respondents.

The Court delivered the following

Devadoss, J.

JUDGMENTS :—*Devadoss, J.* :—The appellant's father Appalaraju was taken into the family of his father-in-law and he lived with him as a member of the family. Appalaraju and his three brothers-in-law effected a division of the family properties and Appalaraju was given one-fourth share in them. In 1911 defendants 1 and 2 herein instituted a suit against the appellant for the recovery of 9 acres of land on the ground that the granting of a share of the joint family property by their father was not binding upon them as Appalaraju was not a member of the joint family. To that suit the other members of the family were parties. The suit was compromised and a razinama decree was passed on 22nd January, 1912. According to the terms of the razinama, the plaintiff should adopt Thimmaraju, the second son of the plaintiff (1st plaintiff in the previous suit) within two months from the date of the razi and if he did so he should enjoy the entire property which fell to his father Appalaraju's share and if he should fail to take the boy in adoption he should retain only one-half of the 27 and odd acres and the other half should go to the plaintiffs. The appellant failed to take the boy in adoption and he now sues for the recovery of half of the 27 and odd acres on the ground that the razinama is not binding on him as it was brought about by fraud. The question of fraud is found against and the only point that is now urged for setting aside the razinama is that it is opposed to public policy and therefore the appellant is entitled to get back the 14 acres of which he was dispossessed in execution of the razinama decree. Madhavan Nair, J., held that the

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razinama was a *bona fide* family settlement and it could not be impeached by the appellant.

The main contention urged on behalf of the appellant is that the term as regards taking the boy in adoption is opposed to public policy as no one can be compelled to make an adoption and any consideration paid for taking a boy in adoption is illegal and opposed to the Hindu Law. The admitted facts are, the appellant's father Appalaraju was the son-in-law of Subbaraju. He belonged to a different family and on his marrying the daughter of Subbaraju he was asked to live in the family and look after the cultivation. It is immaterial to consider now whether Appalaraju brought the properties of his own family and made them part of his joint family property. After the death of Subbaraju the three sons effected a division of the family property and gave Appalaraju a fourth share. The grandsons by one of the three sons of Subbaraju attacked the arrangement on the ground that their father had no right to give away a portion of the family property to a stranger of the family, and the other members of the family supported the contention of the plaintiffs. In order to bring about peace in the family and in order to prevent further litigation and loss, arbitrators settled the disputes between the parties in a way which was considered satisfactory to all of them.

If the suit went against the present plaintiff (the 1st defendant in the suit of 1911) he would have lost not only the 9 acres claimed by the plaintiffs in their suit but the 18 and odd acres which represented the share of the two brothers-in-law of Appalaraju. The appellant was allowed to retain all the properties that were given to his father by his maternal uncles on condition that he should adopt the second son of the 1st plaintiff within two months and if he did so all the property which fell to the share of Appalaraju should be enjoyed as joint family property of the plaintiff and his adopted son and that if he failed to do so half of the property in his possession should be delivered to the plaintiffs. When an arrangement of this kind is brought about in the interests of the members of a family, it would require very strong grounds to set it aside at the instance of any one of the parties to the arrangement.

The appellant was childless at the time. His wife is a daughter of one of the sons of Subbaraju. As he was childless he would have naturally liked to adopt some boy and defend-

ants 2 to 7 wished that the appellant should adopt one of the sons of the family so that the appellant might remain in the family and that his line should be perpetuated without in any way disturbing the peace of the family. Can it be said in those circumstances that the arrangement was illegal and one that was opposed to public policy? It is argued by Mr. T. M. Krishnaswami Aiyar for the appellant that an adoption should be a voluntary act, that no person should be forced or coerced into making an adoption, and that no inducement should be held out for making an adoption. The adoption of a boy is a religious act and is one which is necessary for the salvation of the soul. If a person is induced to do what is necessary for his salvation and the salvation of his ancestors, could his act be considered illegal? If a person is asked to adopt a boy by the promise of sufficient means to maintain himself and the boy, I do not think that the adoption induced by such promise would be invalid, or would militate against the rules of Hindu Law governing adoptions. If an inducement is made to a man to adopt a boy whom he could not adopt or whose adoption would be of no avail to him the matter would be different. But where the boy suggested is a proper person to be adopted, any proper inducement to him would not invalidate the adoption. It is well settled that if a person promises to settle some property or give a sum of money on condition or in case that the other person marries the promisor's daughter or any girl in whom he is interested not only would the marriage be valid but the promisee would be entitled to enforce against the promisor the promise whereby he was induced to marry the girl. This principle is stated by Lord Chancellor Lyndhurst in *Hammersley* v. *De Biel* (1): "The principle of law, at least of equity, is this—that if a party holds out an inducement to another to celebrate a marriage and holds them out deliberately and plainly, and the other party consents, and celebrates the marriage in consequence of them, if he had good reason to expect that it was intended that he should have the benefit of the proposal which was so held out, a Court of Equity will take care that he is not disappointed, and will give effect to the proposal." The promise to settle some property or to give a certain sum of money on the promisee marrying a particular individual is enforceable in law both in England and in India. It is difficult to see why an adoption which takes place by reason of a promise to pay a certain sum of money or settle some property on the adopter is

1. (1845) 12 Cl & Fin 45: 8 E R 1312 at 1327.

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opposed to public policy. As observed by Chandavarkar, J., in *Shri Sitaram Pandit* v. *Shri Harihar Pandit* (2), "A boy is adopted by a sonless Hindu for perpetuating his line; paying off his dues to his ancestors, keeping up his name, and securing for him and his ancestors a place in heaven. These are sacred purposes according to the Hindu Shastras." That being the object of an adoption, an inducement to a man to adopt a proper boy is not an improper or an illegal act, and an adoption taking place under an inducement is not invalid.

What is urged before us is that it restrains the plaintiff-appellant from adopting whomsoever he liked and such a restraint is improper. There was no restraint on the appellant's adopting anybody before the razinama was entered into. It was only for the sake of the peace of the family and for the benefit of the appellant that he was asked to take the second son of the 1st plaintiff in adoption. It was open to him to have refused to consent to such a condition in which case the plaintiffs in that suit might have succeeded in getting a decree in their favour. It cannot therefore be said that the appellant's discretion was fettered by any arrangement as that evidenced in the razinama.

Great reliance is placed upon *Eshan Kishar Acharjee Chowdhry* v. *Haris Chandra Chowdhry* (3) for the position that no consideration should be given for taking a boy in adoption and that taking a boy in adoption for a consideration paid to the father would make the adoption invalid. In that case it was held that "An adoption of a son after payment of price is not recognised in the present, the *Kali, Yuga*. The only adoption now recognised is that of the *dattaka* son, or son given. A contract to give a son in adoption, in consideration of an annual allowance to the natural parents is void under S. 23 of Act IX of 1872, inasmuch as the contract, if carried out, would involve an injury to the person and property of the adopted son, and would defeat the provisions of the Hindu Law." The plaintiffs therein wanted to enforce a contract which was entered into at the time when the boy was given in adoption. The adoption itself was not declared invalid but it was held that the plaintiffs could not sue on the contract. An adoption cannot be declared invalid by reason of any collateral arrangement of contract entered into between the adoptor and the adoptee's natural father, for it would do incalculable harm to the adopted boy if the adoption is to be declared invalid by reason of any

2. (1910) I L R 35 B 169 at 180. 3. (1874) 13 Beng L R App 42.

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arrangement between persons over whom he had no control. By adoption the adopted boy loses his rights in the natural family and if the adoption is declared invalid he could not acquire any rights in the adoptive family, and it would not be proper to visit on the adopted boy the sins of the natural father and the adoptive father, for the adoptee in the *dattaka* form is a minor and is not in a position to have a say in the matter of the arrangement between them. It is upon this principle that a boy who is taken in adoption under an agreement which is unenforceable in law is held good and the arrangement is considered to be collateral. If the adoption is otherwise good, that is to say, if the adoptor could make a valid adoption, if the adopted boy was a proper person and if the ceremony of adoption was properly performed, it is opposed to natural justice that the adoption should be set aside for anything which preceded the adoption. In *Murugappa Chetty* v. *Nagappa Chetty* (4) it was held that the receipt of money by the natural father in consideration of giving his son and the payment of such by the adoptive father though illegal and opposed to public policy, do not make the adoption invalid, as the gift and acceptance of the boy is a distinct transaction clearly separable from the illegal agreement and payment. Such payment has not the effect of converting the adoption into an "affiliation by sale, a form now obsolete." Mr. Justice Subramania Aiyar, who delivered the judgment in that case, referred to the practice which prevailed among a certain class of people of taking money consideration for giving a boy in adoption. In every case of adoption the natural father expects some benefit for himself or for his son and nobody would think of giving a boy in adoption to a pauper. Mercenary consideration enters into most transactions like adoption and marriage, and the adoption or marriage is not rendered invalid merely because persons other than the contracting parties or persons interested in them have a mercenary motive. What the law refuses to recognise is the contract or agreement whereby third persons who are not parties to the transaction try to acquire monetary benefit by promoting it.

Even the adoption of an only son has now been held to be valid, however reprehensible that may be according to the strict mentions of Hindu jurists. The Court always try to give effect to an arrangement which is irrevocable and are very reluctant to set aside such an arrangement, unless the arrangement itself is illegal or opposed to public policy. In *Venkata Krishnayya*

4. (1905) I L R 29 M 161; 16 M L J 22.

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v. *Lakshmi Narayana* (5) it was held that, although a marriage when performed in the Asura form is valid, an agreement to pay to the father any consideration for such marriage is not valid and the money cannot be recovered by a suit. If the money had been paid and the marriage solemnized, the money could not be recovered. In *Devarayan* v. *Muthuraman* (6) it was held an arrangement between *A* and *B* that *B's* daughter shall marry *A's* son and that, if she fails to do so, *B* shall pay a sum of money to *A*, is opposed to public policy and void under S. 23, Indian Contract Act. These cases illustrate the principle that a proper act when properly done should not be declared invalid or set aside by reason of anything which took place not between the contracting parties but between third persons interested in the contracting parties.

The next contention urged is that the clause in the razinama is a penal clause and therefore should be relieved against. The clause is :—

"If for any reason if the 1st defendant should fail to make an adoption in the said manner, the 1st defendant should enjoy as rightful owner only one-half out of the entire property mentioned in the plaint schedule, that is, acres 27-79 1|2 and the house according to good and bad qualities, that the 1st defendant should deliver possession of the remaining half of the property to the plaintiffs for being enjoyed by them".

The appellant if he failed in the suit of 1911 would have lost the whole of his property. By the arrangement he was allowed to retain the whole of the property if he adopted the boy. By adopting the boy the appellant's share would be one-half of 27 odd acres as the adoptive son would be entitled to an equal share and by not adopting the boy his share is not taken away. It is to his advantage to make an adoption and if he adopted the particular boy he would get for the boy half the suit property. Whether he makes an adoption or not the share to which he would be entitled would be the same. It is therefore not easy to conceive how the clause could be said to be a penal clause.

It is next urged that the plaintiff if he succeeded would be only entitled to one-third of 29-79 acres and his share being one-half nearly 14 acres if the adoption did not take place the clause should be considered a penal clause. As already pointed out it was a family arrangement and it must have been considered an equitable arrangement at the time. It is suggested that for costs and other reliefs 5 acres more were arranged

5. (1908) I L R 32 M 185: 18 M L J 403 (F B).
6. (1912) I L R 37 M 393: 24 M L J 510.

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to be given to the plaintiffs in case the adoption did not take place, and as we have no materials before us as to why 5 more acres were to go to the plaintiffs in the suit in case the adoption did not take place, we cannot consider the contention and family arrangement such as this should not be lightly upset. We concur in the reasoning of the learned Judge and the conclusion he arrives at, namely, that this is an equitable arrangement. There was no conflict between duty and interest in this case. On the other hand, the appellant of his own free will consented to make the adoption and in order to benefit the boy to be taken in adoption the plaintiffs agreed to allow him to retain the property in the suit and if he did not make the adoption he was to lose the advantage which was promised to him.

In the result the appeal fails and is dismissed with costs of 1 and 2 respondents.

Waller, J.

Waller, J. :—There is, to my mind, nothing that is contrary to public policy in the agreement which was intended to settle a family dispute. It cannot be said that the appellant was either induced or forced by it to make an adoption. If he adopted he took half the property and the adopted son took the other half. If he failed to adopt, he still took half the property. Whichever course he followed, the result was, as far as he was concerned, the same. He gained no more by adopting than he did by refusing to adopt. There was therefore no improper inducement to adopt. He lost nothing by not adopting. There was therefore no penalty for his failure to do so. I agree that the appeal must be dismissed with costs of respondents 1 and 2.

N. S. ——— *Appeal dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE PHILLIPS AND MR. JUSTICE RAMESAM.

Messrs. Walker & Co., a firm of merchants carrying on business in Second Line Beach, Madras ... *Appellants** (*Defts.*)

v.

Messrs. G. Abdul Aziz Saheb & Co., a firm of merchants carrying on business at premises No. 20, Sydenham's Road, Periamet, Madras ... *Respondents* (*Plffs.*).

Messrs. Walker & Co. v. Abdul Aziz Saheb & Co.

Trust deed—Suit by non-assenting creditor to recover the value of goods consigned as a free consignment—Execution of trust deed by the debtor—Im-

*O S Appeal No. 94 of 1925. 15th October, 1925.

Messrs. Walker & Co. v. Abdul Aziz Saheb & Co.

pleading of the trustees as defendants by the plaintiff to follow the goods or their proceeds in their hands—Plaintiff whether must be taken to have given up his right of action against his debtor as having accepted the deed.

The plaintiff brought the suit to recover the value of certain goods consigned by him with the 1st defendant as a free consignment. After the institution of the suit, the 1st defendant executed a trust deed in favour of his creditors. The plaintiff's name did not occur in the list of creditors at the end of the deed. The plaintiff applied to implead the trustees as the 2nd defendant to the suit on the ground that the consigned goods were held by the 1st defendant as trustee for the plaintiff and that he can follow the goods or their proceeds into the hands of the trustees under the trust deed and the same was ordered. The Court found that the trust fund was not identifiable and consequently disallowed the claim against the 2nd defendant but gave a decree against the 1st defendant. On appeal the 1st defendant contended that the plaintiff must be taken to have given up his right of action against the 1st defendant by impleading the 2nd defendant.

Held, that the plaintiff cannot be said to have given up his claim against the 1st defendant, simply because he wanted to make the 2nd defendant also liable on the ground that the amount due to him was trust money in his hands.

Quaere: Where a clause in a trust deed provided that, in the discretion of the trustee, or if a majority of the Committee of Inspectors directs, it shall be lawful for the trustee to pay in full or otherwise than by dividends under the trust deed, any creditor or creditors who shall decline to execute or assent to the trust-deed, whether a mere attempt on the part of a creditor to obtain a payment larger than the dividend under such a clause, not agreed to by the trustee, and not coupled with any other conduct on the part of the creditor will amount to an acquiescence in the deed of assignment.

On appeal from the judgment of the Hon'ble Mr. Justice Coutts Trotter, dated 30th August, 1923, passed in the exercise of the Ordinary Original Civil Jurisdiction of the High Court in C. S. No. 714 of 1922.

R. N. Aingar instructed by *Messrs. King and Partridge* for appellants.

K. Bhashyam Aiyangar and *V. C. Gopalaratnam* for respondents.

The Court delivered the following

JUDGMENT :—This is an appeal from the Original Side. The suit was brought to recover the value of certain goods consigned by the plaintiffs with the 1st defendant firm of Messrs. Walker & Co. as a free consignment. The suit was filed on 24th August, 1922, and the written statement of Messrs. Walker & Co. was filed on 2nd October, 1922. By that time, Messrs. Walker & Co. had executed a trust-deed in favour of the creditors with the firm of Messrs. Fraser & Ross as trustees. In the list of creditors at the end of the deed, the plaintiff's name does not occur. We are informed that the written statement of Messrs. Walker & Co. was signed by Mr. Fraser under cl. (2) of the deed authorising him to

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defend suits against Messrs. Walker & Co. In December 1922 the plaintiff having heard of the assignment, applied by Judge's summons to make Messrs. Fraser & Ross parties to the suit and their firm was impleaded as 2nd defendant.

The plaintiffs' contention that the 2nd defendant was liable on the ground that the consigned goods were held by Messrs. Walker & Co. as trustees for the plaintiffs and that the plaintiffs can follow the goods or their proceeds into the hands of the assignees, was disallowed by the learned Chief Justice on the ground that the trust fund was not identifiable. He relied on *In re Hallett and Co. : Ex parte Blane* (1). He also held that the plaintiffs did not give up their right of action against the 1st defendant by impleading the 2nd defendant. The 1st defendant appeals and the contention before the learned Judge has been repeated before us.

The principle has been stated thus by Lord Cranworth in *Forbes* v. *Limond* (2) :—

"But this, I think, is perfectly certain that no person can be considered to have impliedly acceded to a deed of this sort within the true meaning of that expression, who has not put himself in precisely the same situation with regard to the debtors as if he has executed it; the principle of the rule being that, if you put yourself in the situation of having the benefit of a deed you must bear its obligations although you have not literally executed the deed".

In the case of *In re Brindley : Ex parte Taylor, Sons and Co.* (3) it was held that the creditor could not file the bankruptcy petition as he assented to the deed of assignment. Vaughan Williams, L. J. relied on two acts of the creditor, (1) he accepted payment for timber supplied to the trustee, and, (2) he attempted to obtain a sum of money which he could obtain effectively only under the deed, *i. e.*, under the last clause of the deed which provided that, in the discretion of the trustee, or, if a majority of the Committee of Inspectors directs, it shall be lawful for the trustee to pay in full or otherwise than by dividends under these presents, any creditor or creditors who shall decline to execute or assent to these presents. Stirling, L. J. expressly mentioned the first reason and not the second. But, towards the end of his judgment he stated : " For these reasons and other reasons stated by the Lord Justice, I think the appeal ought to be allowed. " Cozens-Hardy, L. J. said : "I am of the same opinion and for the same reasons. " He then pointed out that the last clause of the deed was a most improper clause as it offers a bribe to non-assenting creditors. I doubt if a mere attempt to obtain

1. (1894) 2 Q B 237. 2. (1854) 4 De G M & G 298 at 315.
3. (1906) 1 K B 377.

a payment larger than the dividend under such a clause, not agreed to by the trustee, and not coupled with any other conduct on the part of the creditor (as is the case just cited) will amount to an acquiescence in the deed of assignment and if it does not, there is nothing in the present case to show that the plaintiffs have "put himself in the situation of having the benefit" of the deed to use Lord Cranworth's language. But I will assume that a mere attempt to obtain payment from a trustee under a clause of the kind may amount to an acquiescence. In the present case, there is such a clause (cl. 8).

But what are the facts of the case before us? The plaintiffs never agreed to accept a payment *pro rata*. It is stated by the learned Counsel for the appellant that Messrs. Fraser & Ross were and are willing to pay the plaintiff *pro rata*. The plaintiffs would not have it but insisted on a decree for the full amount claimed and because of this, the suit was dismissed *in toto* against the 2nd defendant. Nor did the plaintiff make any reference to cl. (8) of the deed either in the affidavit or in the plaint. In paragraph 4 of the affidavit, in stating the contents of the deed, they referred to the power of the trustee to pay either *pro rata* or the whole amount if the creditor is a secured creditor or if there are trust moneys due, but there is no reference to the power of the trustee to pay a larger amount to a non-assenting creditor in his discretion. In paragraph 5 they wind up by saying :—

> "Leave should be granted to the plaintiff to make the necessary amendments to the plaint alleging cause of action against the trustees also, as it is necessary that any adjudication that may be made should bind Messrs. Fraser and Ross not merely as Agents of Messrs. Walker and Co., but also as trustees."

Leave was granted and paragraphs 10 (*a*) and 10 (*b*) added to the plaint paragraph 10 (*a*) stated the summary of the contents of the deed of assignment. In paragraph 10 (*b*) the plaintiffs say :—

> "The moneys realized by the 1st defendant are plaintiff's moneys in the hands of the 1st defendant firm or in other words trust moneys payable to plaintiffs specifically. The plaintiffs therefore submit that they are entitled to be paid even "by the 2nd defendant firm preferentially and in full."

They did not refer to cl. (8) of the deed but alleged as the ground for 2nd defendant's liability that the proceeds of the goods were trust moneys. This is the only ground given for 2nd defendant's liability. The use of the word "preferentially" in paragraph 10 (*b*) without referring to cl. (8) of the deed

cannot amount to more than is implied by the use of the words "in full" following it and this is all what the learned Chief Justice must have meant in the last sentence of the paragraph in his judgment dealing with this question.

Not only was 1st defendant not given up but it is also expressly stated that the 2nd defendant's liability was to be in addition to the 1st defendant's by the use of the word "even" in paragraph 10 (*b*) of the plaint and "also" in the affidavit.

If the trust fund was identifiable or the goods could be traced to the trustee's hands both the defendants would be fully liable and it is not a case where only one or the other can be liable. The claim in paragraph 10 (*b*) is thus one founded on a legal basis and not on the terms of the trust-deed. As the trust fund was not identifiable the double claim failed, but because of this double claim, the intention cannot be imputed to the plaintiff in the absence of clear and unambiguous words or acts amounting to abandonment of the 1st defendant. So long as the claim against the 2nd defendant is attributable to the ground that there were trust moneys and is coupled with the claim against 1st defendant there can be no election to give up 1st defendant nor acquiescence in the deed. Nor does the case of *Harland* v. *Binks* (4) help the appellant. There the creditor applied to the trustee for an explanation and when he received the trustee's reply expressed himself that "he was satisfied" and Lord Campbell held that this amounted to acquiescence. In the present case we have neither negotiations nor any act outside the Court and all that can be relied on by the appellant is contained in paragraphs 10 (*b*) of the plaint and (5) of the affidavit both making it clear that the 1st defendant was not to be given up. Though it turned out that plaintiff cannot make the 2nd defendant liable in the way he wished, it is clear that he never wished to make them liable on a footing which involved the giving up of the 1st defendant. The appeal fails and is dismissed with costs.

If we had come to the conclusion that the plaintiff accepted the deed, it would involve a miscarriage of justice to dismiss the suit *in toto*. The plaintiff could be then entitled to a decree *pro rata* against the 2nd defendant. But this can be given under O. 41, R. 33 only after adding them as parties in the interests of justice—a course to which the appellants' counsel has no objection. But on the view we take, it is unnecessary.

N. S. *Appeal dismissed.*

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4. (1850) 15 Q B 713.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE KRISHNAN AND MR. JUSTICE VENKATASUBBA RAO.

Erath Unikkat Tarwad Karnavan and Manager Eressa Menon ... *Appellant** (*Plaintiff*)

v.

Abdul Rahiman *alias* Kunhutti and others ... *Respondents* (*Defendants*).

Eressa Menon *v.* Abdul Rahiman.

Limitation Act, S. 20 (2)—Receipt of rent by mortgagee—Lease of mortgaged property by mortgagee to mortgagor—Rent payable under, including Government revenue payable in respect of mortgaged property—Stipulation in lease deed for payment thereof by mortgagor—Payment thereof by mortgagor in pursuance of—If amounts to receipt of rent by mortgagee—Lease to mortgagor one from year to year—Rent if a charge on property—Period for which rent recoverable in suit by mortgagee—Mortgage and lease if part of one transaction or independent and separate transactions—Test—Period for which rent recoverable by mortgagee in latter case.

Defendants executed a mortgage deed in favour of the plaintiff which recited that the properties were put in the possession of the mortgagee. On the next day the plaintiff(mortgagee) executed a lease deed in favour of the defendants (mortgagors) the effect of which was to transfer possession back to the mortgagors who agreed to hold the property as the lessees of the mortgagee. By the lease deed a certain lump sum (in cash and paddy) was fixed as rent; the Government revenue and the *michavaram*, the mortgagors were to pay out of that rent, and they were to pay the balance remaining to the mortgagee. Under the mortgage deed the income less Government revenue and *michavaram* was to be appropriated towards interest. The mortgage was not an usufructuary mortgage, pure and simple, because it contained a covenant on the part of the mortgagors to pay the amount, and it also enabled the mortgagee in case of default to recover the sum by bringing the property to sale. In a suit brought by the mortgagor for the recovery of the sum due under the mortgage by a sale of the property, it was admitted that the relationship of lessor and lessees subsisted between the plaintiff and the defendants up to the date of suit and that the defendants had throughout the period paid Government revenue in respect of the suit properties. The question for decision was whether the payment of the Government revenue by the mortgagors amounted to a receipt of rent by the mortgagee within the meaning of S. 20 (2) of the Limitation Act.

Held, that the payment in question did amount to a receipt of rent by the mortgagee within the meaning of S. 20 (2).

The payment must, in view of the obligations imposed on the mortgagors by the lease deed, be deemed to be a payment on behalf of the mortgagee.

The Government revenue being by the lease deed part of the rent reserved thereunder, it must be treated as rent within the meaning of S. 20 (2).

The payment by the defendants is really a receipt of the sum paid by the mortgagee.

Receipt of rent to be effectual under S. 20 (2) need not amount to a payment of interest or payment of principal so as to satisfy the first part of that section, and the fact that the Government revenue, while being under the terms

*Appeal No. 350 of 1922. 6th April, 1926.

Eressa Menon v. Abdul Rahiman.

of the mortgage and lease deeds, a part of the rent, was not interest, makes no difference. Receipt of rent mentioned in sub-S. (2) is not subject to the conditions mentioned in sub-S. (1). The meaning of S. 20 is that a fresh period of limitation shall be computed from the time of the payment referred to in sub-S. (1) or the receipt referred to in sub-S. (2).

Held further that, though in the opening portion of the lease deed the lease was stated to be for a fixed period of year, the parties intended to enter into a lease from year to year, and the mortgagee was entitled to a decree with charge on the property for rent with interest as provided in the document for a period of twelve years immediately preceding the suit.

The mortgagee contended that the mortgage and the lease deeds really constituted one transaction, and that he was, on that footing, entitled to interest for the whole period from the date of the mortgage to the date of suit which was instituted nearly 20 years after the date of the mortgage.

Held, disallowing the contention, that, on the true construction of the two documents, the parties must be deemed to have intended that each should constitute a distinct and independent transaction.

It is a question of intention whether a mortgage deed and a lease deed by the mortgagee to the mortgagor leasing the mortgaged property to the latter should be read together and be held to constitute a single transaction or should be taken separately and each regarded as a separate and independent transaction. Each case must depend upon its own facts.

Appeal against the decree and judgment of the Court of the Subordinate Judge of South Malabar at Calicut in O. S. No. 9 of 1920.

B. Sitarama Rao and *A. Vasudeva Menon* for appellant.

K. P. M. Menon and *P. Govinda Menon* for respondents.

The Court delivered the following

JUDGMENT :—The plaintiffs filed the suit out of which this appeal arises, for enforcing the terms of two deeds, a mortgage deed and a lease deed, Exs. C* and D† respectively.

EXHIBIT C*.

MORTGAGE DEED BY K. P. KOYA TO UNNIRI MENON

Mortgage deed with possession executed on the 12th Meenam 1074 (24th March, 1899) by the sons of Kunnath parambil Kunhammu, deceased, viz.: (1) Koya, Karnavan and Manager, (2) Younger brother Kunhammad, (3) Avuthala, and (4) Abdul Rahiman *alias* Kunhutti, of Pothanur amsam and desam, Ponnani taluq, in favour of Erath Unikkat Kalliani Amma's son Unniri Menon, Karnavan and Manager of the tarwad, of Edappal amsam and desam, the said taluq. We are entitled to the 22 items of properties described in the Sch. A below on the rights thereon as shown in Sch. B We have this day mortgaged to you with possession the said items together with the kuzhikurs and chamayams and the encumbrances shown below for Rs. 4,800; as satisfaction has been rendered to us in the following manner in respect of the consideration of Rs 4,800 aforesaid towards our tarwad necessity. and as we have this day given possession to you of items 1 to 22 in the schedule together with all kuzhikurs and

The mortgage deed, dated 24th March, 1899, recites that the properties were put in the possession of the mortgagees.

chamayams on items 5, 6, 7, 9, 10, 12, 21 and 22, you shall hold or cause to hold possession of all the items in the schedule together with the kuzhikurs and chamayams, pay the Government revenue and *jenmi michavaram* and appropriate the balance of the income towards interest on the said amount of Rs. 4,800.

The amount due to you this day made up of the balance out of the amount due to you in accordance with the decree in Suit No. 446 of 1886, Kootnad, after deducting the amount as per panayam executed previously, and obtained against executant No. 3 among us exclusive of what has been relinquished, is Rs 2,507-7-11; the amount received to discharge the debt due to Pallassana gramam Seshan Pattar exclusive of what has been relinquished is Rs. 90; the amount due to Thokkanam veettil Kunhammad over items 2 to 22 in accordance with the panayam deed, dated 8th Karkatakam 1069 (22nd July, 1894) is Rs. 1,085 and 487 paras of paddy, the amount due in accordance with the pattam chit of the said date exclusive of revenue and *michavaram* at 306 paras and 28 nazhis of paddy per annum according to 30 *Thappu* inclusive of 1074 (1898-99) and exclusive of what has been paid, is 1,738 paras and 10 nazhis of paddy; the value calculated for the said principal amount and interest is Rs. 2,202-8-1; the said panayam right together with interest was obtained on assignment by Konganam veetil Seydutti Haji in accordance with assignment deed, dated 5th Kanni, 1073 (21st September, 1897); the amount therefore reserved with you to be paid to Seydutti Haji aforesaid is Rs 2,208-8-1; under all the said items together, Rs 4,800 has been satisfied to us.

But on your demand of the panayam amount of Rs 4,800 at any time after the expiry of one year from this date, we agree to pay you the same in a lump sum and obtain release deed at our cost together with the documents described in Sch. B which you shall obtain when the encumbrance due to Seydutti Haji aforesaid shall be discharged. If we make default in our payment of the panayam amount, you shall be at liberty to recover the same by the sale of all our rights on the schedule items together with all the kuzhikurs and chamayams on them and personally from us. These items have been attached by you and proclaimed for sale on the coming 6th March, in satisfaction of decree debt in Suit No. 446 aforesaid and petition was presented through vakil in M. P. No. 437 of 1899 to postpone the sale and for permission to dispose of the properties by private sale; the said petition was admitted and favourable orders passed thereon; and on further petition the sale has been postponed to the 27th March. We have made you believe *bona fide* that there are no other encumbrances on the aforesaid items to anybody else. It has been agreed that whenever at the proper season the panayam amount is paid after the expiry of one year from this date, the items shall be surrendered together with the documents got back on the discharge of the encumbrance. This deed is in addition to the mortgage deed with possession for Rs 3,000 executed by four of us on the 5th Meenam, 1073 (17th March 1898) and registered as No. 860, Kuttipuram, on the 31st March, 1898.

EXHIBIT D†.

PATTAM CHIT BY KOYA, ETC., TO UNNIRI MENON.

Pattam chit executed on the 13th Meenam, 1074 (25th March, 1899) by the sons of Kunnath parambil Kunhammu (deceased) of Pothanur amsam and desam, Ponnani taluq, viz.: 1. Koya, the Karnavan and Manager, 2 Kun-

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The effect of the lease deed which was executed on the next day was to transfer possession back to the mortgagors who agreed to hold the property as the lessees of the mortgagees. Legal possession was thus transferred to the mortgagees who thus became the lessors and the physical possession remained with the mortgagors whose possession was that of the lessees. In other words, the transaction was of the usual type—a possessory mortgage, possession being left with the mortgagors under a rental agreement. Ex. C, however, is not an usufructuary mortgage pure and simple, for, it contains a covenant on the part of the mortgagors to pay the amount and it also enables the mortgagees in case of default to recover the sum by bringing the property to sale. It is this clause that enables the plaintiff to ask for a sale of the property. The learned Subordinate Judge has passed a decree for the principal amount covered by Ex. C and for arrears of rent under Ex. D for three years previous to the institution of the suit. This judgment is challenged both by the plaintiffs and the defendants,

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hammad, 3. Arudal, and 4. Abdul Rahiman *alias* Kunhutti, in favour of Erath Unikkat Unniri Menon, son of Kalliani Amma, Manager of the tarwad of Edappal amsam and desam, the said taluk. Out of the 22 items described in the schedule below which we have mortgaged with possession to you yesterday for Rs. 4,800 being the debt incurred for our tarwad necessity, we have taken charge of items 5, 6, 7, 9, 10, 12, 21 and 22 together with all kuzhikurs and chamayams on rent for one year and we have towards security of rent paid an advance rent of Rs. 142-13-10. The annual rent on account of the parambas is Rs. 64 and 588 paras of paddy equivalent in value to Rs. 336 at Rs 1-9-2 per para at the current rate. Out of this the amount allowed to us for Government revenue, the upkeep expenses of the parambas and *michavaram* is 15 paras and 22½ nazhis according to the standard *nazhi* and Rs 64. Exclusive of the above, the annual rent which ought to be given to you is 572 paras and 7½ nazhis according to the standard nazhi. We agree to pay the said paddy of 572 paras and 7½ nazhis of paddy according to the standard nazhi after getting the paddy cleaned in the months of Kanni and Makaram 1075 and also give you the revenue and *michavaram* and get the pattam chit endorsed in respect of the payment on the day they are given and also surrender the items at our cost. If we made default in the payment of rent on the fixed periods, the arrears shall be set off against the advance rent and for the balance the equity of redemption on the items over and above the panayam right has this day been settled as a mortgage; if arrears of rent are allowed, they shall be paid with interest at 2 per cent. for the period until they are cleared; if default be made in the payment of revenue and *michavaram* and if you happen to pay the same, you are at liberty to realise the same together with interest at 2 per cent. per mensem by the sale of the equity of redemption on the items over and above the said panayam right and the balance, if any, shall be paid out of our other properties and ourselves shall be liable for the same. In witness hereof are the undersigned, written in the hand of Elasseri Variath Krishna Variar.

* * * * *

the plaintiffs (in their appeal) stating that they are entitled not only to the principal but also the interest in full under Ex. C and the defendants urging (in their memorandum of objections) that the claim is barred by limitation excepting in regard to rent for three years previous to the suit and that the decree in other respects is wrong.

We shall deal with the plaintiffs' claim to principal and interest separately. The amount under Ex. C became payable at the expiry of a year from its date, that is, in March 1900 and as the suit was filed in 1920 the claim would be *prima facie* barred by limitation. The plaintiff, however, relies upon S. 20 (2) of the Limitation Act and says that his claim is taken out of the statute of limitation by reason of a receipt of rent under that sub-section. The question to be decided is, has there been a receipt of rent within the meaning of S. 20 (2) ? It is necessary in this connection to clear the ground by saying that the defendants have acquiesced in the decree for rent passed by the Lower Court and this is consistent with the admission before us that the tenancy under Ex. D is subsisting. We shall presently consider what is the proper construction of Ex. D, but it is sufficient for the present purpose to observe that it is conceded that the relationship of lessor and lessee between the plaintiffs and the defendants continued at the date of suit. Ex. C directs the mortgagees to pay Government revenue, jenmi *michavaram* and to appropriate the balance of the income towards the interest due on the principal amount of Rs. 4,800. This arrangement pre-supposes that possession was to remain with the mortgagees. By Ex. D a certain lump amount (in cash and paddy) was fixed as rent; the Government revenue and *michavaram* the mortgagors were to pay out of this rent and they were to pay the balance remaining to the mortgagee. Under Ex. C the income *less* Government revenue and michavaram was to be appropriated towards interest. The liability to pay Government revenue and *michavaram* primarily thus rested on the plaintiffs but by Ex. D the defendants were constituted the plaintiffs' agents for the purpose of making these two payments. As the property was given back to the defendants on lease and as the income would be received by them, they were directed to pay these two amounts. The learned Subordinate Judge has held as a question of fact that the mortgagors during this period paid the Government revenue on plaintiffs' behalf. He has further held as a question of law that such a payment takes the case under S. 20 (2) out of the statute of limitation. In our

opinion, his conclusion on both these points is correct. In paragraph 6 of the plaint the plaintiffs distinctly allege that *michavaram* and revenue were paid by defendants 1 to 20 and their ancestors. In paragraph 7 of the additional written statement, the fact of payment by the defendants and their ancestors is not denied but the plea taken is that the payment was not made on account of the plaintiffs. It is thus undisputed that the defendants and their predecessors paid Government revenue in respect of the suit properties. The question is, did they make the payment on behalf of the plaintiffs? Under Ex. D they undertook to make the payment. Their position as lessees was not repudiated. To the date of suit it is conceded that their position was that of tenants. Why should it be then assumed that the defendants in making the payment did not carry out the term which was binding upon them? Their learned Counsel suggests that the defendants should be taken to have made payments not in pursuance but in contravention of the terms of Ex. D. When the facts are consistent with the defendants having performed their obligation why should we make their act unlawful and impute to them an intention to break the contract? We are therefore satisfied that the learned Judge's conclusion that the defendants throughout paid the Government revenue on behalf of the plaintiffs is correct.

We shall now proceed to consider whether by reason of this payment the claim is saved from the bar of limitation.

S. 20 of the Limitation Act runs as follows:—

(1) Where interest on a debt or legacy is, before the expiration of the prescribed period, paid as such by the person liable to pay the debt or legacy, or by his agent duly authorised in this behalf, *or* where part of the principal of a debt is, before the expiration of the prescribed period, paid by the debtor or by his agent duly authorised in this behalf, a fresh period of limitation shall be computed from the time when the payment was made: Provided that, in the case of part-payment of the principal of a debt, the fact of the payment appears in the handwriting of the person making the same.

(2) Where mortgaged land is in the possession of the mortgagee, the receipt of the rent or produce of such land shall be deemed to be a payment for the purpose of sub-section (1).

It is first contended on behalf of the defendants that the revenue paid to the Government cannot be treated as rent. This argument is clearly untenable because under Ex. D the amount agreed to be paid as rent includes the sum payable as revenue. The fact is that an inclusive amount has been stated as rent, the mortgagor undertaking the liability to pay out of

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it the Government revenue. There is nothing to prevent a tenant from agreeing to pay his landlord any rent he pleases and the landlord directing him to pay out of that rent the revenue on the property. This is not unusual and where the parties expressly agree to treat a certain sum as rent, it is not for the Court to say that that rent is not really rent, because it is liable to certain deductions.

The next contention of the defendant is, that payment by them is not equivalent to a receipt by the landlord (the plaintiff). This objection again seems unsound. What does the payment by the defendants really mean? It involves first receipt by the plaintiff who was under the agreement entitled to receive the sum, and secondly it involves the payment of the same sum by the plaintiff in his turn to the Government. The second contention must therefore be also overruled.

It is thirdly contended by the learned Counsel for the defendants that receipt of rent to be effectual under the section must amount to a payment of interest or payment of principal so as to satisfy the first part of that section. In the present case the Government revenue, while being under the terms of Exs. C and D a part of the rent is not interest. But this, in our opinion, makes no difference. We cannot accept the construction suggested that the receipt of rent mentioned in sub-S. 2 is subject to the conditions mentioned in sub-S. 1. If the argument put forward were sound, it would follow that if rent or produce received is appropriated towards the principal of the debt, the part payment must appear in the handwriting of the person making the payment. Is there a person that makes the payment at all? *Ex hypothesi* there is no such person. Granting that the receipt of the rent by the mortgagee is to be treated as a payment by the mortgagor, is it reasonable to expect that such a payment should appear in the handwriting of the debtor? The object of the section is clearly to benefit the mortgagees in possession who receive the rent or produce from the land. This object will be clearly frustrated by adopting the construction suggested. Sub-S. 1 contains four paragraphs and when in sub-S. 2 it is said that the receipt shall be deemed to be a payment for the purpose of sub-S. 1, it does not follow that the payment referred to must necessarily be that indicated in the first and second paragraphs alone of the first sub-section. We shall be giving effect to the intention of the legislature by holding that the payment referred to is the payment mentioned in paragraph 3.

The section really refers to three things:

(1) Payment of interest on a debt or legacy by the debtor or his agent;

(2) Part-payment of principal of a debt by the debtor or his agent;

(3) Receipt by mortgagee in possession of the rent or produce of the land.

The meaning of the section is that a fresh period of limitation shall be computed from the time of such payment or receipt. This is the effect of the section, but as this idea is expressed in it in a somewhat different order, it has been found necessary to say that the receipt under sub-S. 2 shall be deemed to be payment under sub-S. 1. The section would undoubtedly have been better worded if the receipt of rent had been mentioned immediately after the payment of interest and the part payment of principal and if the provision then followed that fresh period of limitation shall be computed from the time of payment or receipt.

The question is bare of authority but this is the view we take of it and the third contention must be accordingly overruled.

The conclusion of the Subordinate Judge that the claim to the principal is not barred is thus correct.

Now we shall deal with the plaintiffs' claim to interest. The first question that has to be determined in this connection is, does Ex. D create a charge only in respect of one year's rent or generally of all rent that accrues? The answer will depend upon the right reading of the document which is in Malayalam. There are certain errors in the Court translation and they have been brought to our notice in the course of the argument. It is not disputed that the defendants have continued to be tenants under Ex. D. It is not suggested that there was a cessation of tenancy at the end of the first year and there was a new tenancy under S. 116 of the Transfer of Property Act which deals with the effect of holding over. The latter part of Ex. D clearly contemplates the accruing of rent beyond the term of one year fixed. There are two sentences dealing with there being a charge on the equity of redemption. In the first sentence the first year's rent has been mentioned. In the second sentence again there is a reference to rent. The defendants ask us to treat this reference as a mere redundancy. The words "arrears," "till discharged," "added" and "accumulated" in the context in which they occur strongly suggest that the charge that is mentioned in the second sentence refers to the arrears of rent after the first year. Though the parties started by saying in the opening portion of the document that the lease

is for a fixed period of one year, they in truth intended to enter into a lease from year to year, as the latter part of the document clearly shows; and the parties themselves, as shown, treated the transaction as such. As this is the effect of Ex. D the plaintiff will be entitled to a decree with charge on the property for rent with interest as provided in the document for a period of twelve years immediately preceding the suit.

There remains a contention urged for the plaintiff which we shall now proceed to deal with. It is urged that Exs. C and D really constitute one transaction and that the plaintiff is, on that footing, entitled to interest for the whole period from the date of the mortgage to the date of suit. We cannot accede to this argument. It is a question of intention whether the two instruments should be read together and be held to constitute a single transaction or they should be taken separately and each regarded as a separate and independent transaction. Each case depends upon its own facts and no good purpose will be served by our citing the numerous cases to which reference has been made at the bar. A careful consideration of the two documents in the case leads one to the conclusion that the parties intended that each should constitute a distinct and independent transaction. There is first the fact, that Ex. C while it provides for interest, does not make the mortgagors personally liable for it. Ex. D, on the other hand, contains the personal covenant. Secondly, receiving an advance of rent (*mumpattam*) and referring to it in the rental agreement shows that the parties intended that the relation should be that of lessor and lessee. There is thirdly the fact, that whereas Ex. C does not provide for compound interest there is distinct stipulation in Ex. D under which interest becomes payable on arrears of rent (which in other words is compound interest). As a matter of fact the parties took particular care to stipulate that certain obligations should flow from the relationship created of landlord and tenant. Fourthly, it is significant that under Ex. D, arrears of rent are charged upon the property. There would be a charge in an ordinary mortgage transaction implied in law, so far as interest is concerned. It would be superfluous to refer to such a charge but it would be necessary expressly to make the rent a charge on the property. This is what the parties really did. On the whole we are inclined to the view that the parties intended to treat each instrument as constituting a distinct and independent transaction. It is the combined and cumulative effect of the circumstances mentioned that makes this document evidence two

distinct transactions. If these elements were not found in this combination, the result might be different but we must get at the intention from all the facts and in the present instance we are satisfied that the two instruments should be considered as evidencing two distinct transactions.

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The result is, the appeal is allowed in part and the decree of the Lower Court is modified by awarding to the plaintiff a mortgage decree for the principal amount and rent at 572 paras and 7⅓ nazhis or its equivalent in money at the rate fixed by the Lower Court for a period of twelve years, prior to the institution of the suit, with interest on rent as provided for in Ex. D. Time for redemption six months. There will be no personal decree for rent. In the appeal, each party will bear his own costs. The Memo. of Objections is dismissed with costs.

A. Vasudeva Menon for appellant.

K. P. M. Menon and *P. Govinda Menon* for respondents.

The case having been set down for being spoken to the Court delivered the following

JUDGMENT :—Mr. Menon for the respondent had this case posted again as he contended that the judgment had gone wrong. We have directed him to file a review petition if he is aggrieved by anything in the judgment.

A.S.V. *Appeal allowed in part.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—SIR MURRAY COUTTS TROTTER, *Kt., Chief Justice.*

Varanasi Annapurnamma ... *Appellant** (*Plaintiff*)

v.

Kandikuppa Venkamma (*dead*) and others ... *Respondents* (*1st defendant and her legal representatives*).

Hindu Law—Inheritance—Unchaste daughter, whether excluded from inheritance.

Annapurnamma v. Venkamma.

In Southern India which is governed by the Mitakshara Law, an unchaste daughter is not excluded from inheritance.

Second Appeal against the decree of the Court of the Additional Subordinate Judge of Ganjam at Berhampore in A. S. No. 311 of 1922 (A. S. No. 235 of 1921 on the file

*S. A. No. 1409 of 1923. 6th April, 1926.

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of the District Court of Ganjam) preferred against the decree of the Court of the District Munsif of Berhampore in O. S. No. 33 of 1920.

B. Jagannadha Doss for appellant.

Y. Suryanarayana for respondents.

The Court delivered the following

JUDGMENT :—This is an audacious attempt by a Brahmin Judge to invent a new rule of law, namely, that a daughter who is unchaste is under the same rule of exclusion as a widow and cannot inherit her father's or mother's estate. The only colour for such a contention which has throughout been rejected in Western India is to say that a portion of a text of Brihaspathi is to be treated as a binding rule in Southern India. Now the Dayabhaga has adopted that portion of the text of Brihaspathi and consequently this rule of exclusion has been applied against the daughter under the Dayabhaga Law in Bengal. The Mitakshara while incorporating a portion of the very passage of Brihaspathi in which this prohibition is contained deliberately omits the passage that insists upon the chastity of the daughter. The only possible conclusion by all rules of construction known to me is that it was deliberately omitted because it was not intended to be reproduced. We are governed by the Mitakshara and by nothing else. Therefore I have come to the conclusion that there is no warrant whatever for making this woman's unchastity, which seems to have been proved as a fact to be a ground of exclusion known to the Hindu Law as administered in Southern India under the Mitakshara. The reason why the learned Judge seems to have stretched the law was that, while apparently he was prepared to admit that ordinary unchastity might not be fatal, cohabitation with a Muhammadan was such an aggravated form of unchastity that different considerations should apply. He has no right to introduce moral rules which may be very satisfactory as moral rules into the administration of justice. The appeal must be allowed with costs in this Court.

N. S. *Appeal allowed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE PHILLIPS AND MR. JUSTICE ODGERS.

Chilakalapudi Moolaswami and others ... *Appellants** (*Defendants 2 to 4*)

v.

Gurram Tatayya (minor) by next friend Tikka Sarvarayudu ... *Respondent (2nd plaintiff).*

Moolaswami v. Tatayya.

Minor—Decree against—Gross negligence of guardian—Suit to set aside decree—If maintainable—Remedy if by way of review.

Where a decree has been passed against a minor owing to the gross negligence of his guardian, a suit is maintainable to have it set aside; and the appropriate remedy is not by way of review. Opinion of Field, J. in *Raghubar Dyal Sahu* v. *Bhikya Lal Misser,* (1885) I L R 12 Cal 69 dissented from; *Punnayya* v. *Viranna,* (1921) I L R 45 Mad 425 followed.

Second Appeal against the decree of the Court of the Additional Subordinate Judge of Rajahmundry in A. S. No. 88 of 1921 (A.S.No. 120 of 1921 on the file of the District Court, Godavari) preferred against the decree of the Court of the Additional District Munsif of Rajahmundry in O. S. No. 13 of 1920.

K. Ramamurthi for appellants.

G. Lakshmanna for respondent.

The Court delivered the following

Phillips, J.

JUDGMENTS :—*Phillips, J.* :—This is a suit by the first plaintiff to set aside a decree in a prior suit brought by his guardian during his minority and for recovery of the suit property. The Lower Appellate Court has found that the earlier decree was obtained owing to the gross negligence of the 1st plaintiff's guardian and has consequently held that it is not binding on the 1st plaintiff nor upon his legal representative, the 2nd plaintiff.

Objection is taken both to the finding of fact that there was gross negligence and also to the procedure adopted by the plaintiffs. In coming to the finding that there was gross negligence, the Lower Appellate Court has found that the 1st plaintiff's guardian put forward a false recital in the plaint, made a false admission in the Appellate Court and omitted to adduce most important evidence which was within her power. On these facts I must accept the finding that there was gross negligence.

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*S A No. 106 of 1923. 15th December, 1925.

Moolaswami v. Tatayya.

Phillips, J.

As regards the second point, it is contended on the authority of *Raghubar Dyal Sahu* v. *Bhikya Lal Misser* (1) that the proper procedure was for the plaintiffs to apply for review of the decree in the first suit and not by way of a separate suit. The judgment of Field, J., in *Raghubar Dyal Sahu* v. *Bhikya Lal Misser* (1) does certainly seem to take this view, but his observation is purely *obiter* and is not supported by any very cogent arguments. He merely states that the provisions of the Code of Civil Procedure relating to review are sufficiently wide to include such a case. He does not state to which particular provision he refers, although the section relating to review contains various grounds on which review may be granted. He also appears to draw a distinction between a minor's remedy for setting aside a decree obtained by fraud or collusion and his remedy against a decree obtained by gross negligence. He does not give any authority for this distinction. This dictum was approved in *Beni Prasad* v. *Lajja Ram* (2) but in that case also it was unnecessary for the decision of the suit. In a recent case in this Court, *Punnayya* v. *Viranna* (3), the view of the Calcutta Court was dissented from and it was held that the plaintiff could maintain a suit if the guardian *ad litem* had seriously neglected his interests. With all respect, I agree with the view taken in that case and accordingly dismiss the appeal with costs.

Odgers, J.

Odgers, J. :—I agree. I do not think that any good ground has been shown for distinguishing a case of gross negligence on the part of the guardian of the minor from that of fraud and collusion. The case cited in support of the distinction is *Raghubar Dyal Sahu* v. *Bhikya Lal Misser* (1) where Field, J., observes that "if an infant desires to have a decree set aside on the ground that his next friend had neglected his interests and had not put forward on his behalf good grounds of defence which were available, the proper procedure would be to apply for review" and in the opinion of the learned Judge the provisions of the Civil Procedure Code were sufficiently wide to include such a case. He does not, however, explain within what particular clause of what is now O. 47, R. 1 the matter would fall and it is to be noted that this is an opinion expressed *obiter* in the course of his judgment which does not seem to have been concurred in by the other Judge. The suit was dismissed on the ground that the

1. (1885) I L R 12 C 69. 2. (1916) I L R 38 A 452.
3. (1921) I L R 45 M 425: 42 M L J 429.

plaintiff failed to establish any case of fraud and no decision has been cited to us where a suit has been dismissed on the ground that the proper remedy in such a case was to come by way of review and not by suit. The judgment in *Beni Prasad* v. *Lajja Ram* (2) adopts the Calcutta decision but it is also noteworthy that there the learned Judges held that even if they were to hold that a minor could avoid a decree solely on the ground of gross negligence, they did not think that in the case before them, gross negligence had been established. Reference was also made to *Gregory* v. *Molesworth* (4), in which it was held that a minor could come by what was then called a bill ot review. This seems to have given some ground to the appellant in this case for supposing that the word 'review' is the same in the old equity practice as it is in the Code of Civil Procedure. This, I think, would be an exceedingly dangerous analogy to proceed upon. We know that in the Chancery proceedings were commenced by a bill, whereas on common-law side, they were commenced by a writ. I therefore agree with the decision of Spencer and Ramesam, JJ., in *Punnayya* v. *Viranna* (3), where they dissent from the opinion expressed by Field, J., in *Raghubar Dyal Sahu* v. *Bhikya Lal Misser* (1) and hold that the plaintiff was entitled to maintain a suit, if the Court was satisfied that his guardian *ad litem* had seriously neglected his interests.

On the question of fact I have nothing to add and I agree with Phillips, J., that the appeal must be dismissed with costs.

T. S. V. *Appeal dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE ODGERS.

Yepuri Venkamma ... *Appellant** (*3rd defendant*)

v.

Pabbisetti Parthasarathi & Brothers, by managing partners Pabbisetti Parthasarathi Chetty and others ... *Respondents* (*Plaintiffs Nos.* 1 *and* 2 *and defendants Nos.* 1 *and* 2).

Civil Procedure Code, S. 47—Parties and their representatives—Benamidar—Position of—Limitation Act, S. 14—Liberal construction—Prior suit for declaration of title—Dismissal of, as there was no prayer for possession—Specific

*S A No. 1242 of 1923. 16th April, 1926.

1. (1885) I L R 12 C 69.
2. (1916) I L R 38 A 452.
3. (1921) I L R 45 M 425: 42 M L J 429.
4. (1748) 3 Atk 626.

Venkamma v. Parthasarathi & Brothers.

Relief Act, S. 42—If of the nature of a defect of jurisdiction—Deduction of time.

A benamidar is neither a party nor the representative of a party within the meaning of S. 47, Civil Procedure Code.

Where a prior suit for a declaration of title was dismissed as not maintainable because it contained no prayer for possession, the time taken in prosecuting that suit can be deducted under S. 14 of the Limitation Act, as the defect was of a nature similar to a defect of jurisdiction.

S. 14 of the Limitation Act should be interpreted liberally.

Second Appeal against the decree of the Court of the Subordinate Judge of Kistna at Ellore, dated 19th February, 1923, in A. S. No. 319 of 1922 preferred against the decree of the Court of the Principal District Munsif of Ellore, dated 24th July, 1922, in O. S. No. 832 of 1921.

K. Kameswara Rao for appellant.

V. Suryanarayana for respondents.

The Court delivered the following

JUDGMENT :—In this appeal the questions of law are short though the facts are complicated. The suit was to declare that a decree in O. S. No. 1154 of 1925 brought by the 2nd defendant against three persons, *viz.*, 1st defendant, K. Rangayya and S. Kannayya was obtained by fraud and does not bind the plaintiff in the present suit. He also asks for possession. The defences set up are S. 47, Civil Procedure Code, limitation and *lis pendens*. Both the Courts have now held that defendants 2 and 3 are the benamidars of S. Kannayya, the father of the 1st defendant and the original owner of the house in question. This question which was the subject of issues 1 and 2 was strenuously fought in both the Lower Courts, and being a question of fact cannot be raised in second appeal. But the learned vakil for the appellant (3rd defendant) now wants to take advantage of that finding and say that a benamidar is either a party or the representative of a party under S. 47, Civil Procedure Code. He has referred to *Gur Narayan* v. *Sheolal Singh* (1) for the explanation of the position of a benamidar by the Privy Council. But their Lordships nowhere say that he is either such a party or representative under the section and no authority for that proposition has been produced before me. It perhaps should be mentioned in this connection that it was contended that the plaintiff who obtained a decree in S. C. S. No. 18417 of 1915 in the Madras Small Cause Court against the original owner of the house should be confined to execution proceedings on

1. (1918) I L R 46 C 566: 36 M L J 68 (P C).

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that decree and was prevented by the section from bringing another suit. The point fails.

The second question is one of limitation, namely, the time that has elapsed since O. S. No. 163 of 1917 which the plaintiff brought for a declaration of his title when he was obstructed by certain persons, two of whom seem to have been defendants 2 and 3. The suit was held not to be maintainable because it contained no prayer for possession. The question is whether the time taken in prosecuting this suit by the plaintiff can be deducted in his favour under S. 14 of the Limitation Act. The District Munsif held that it could. This was also the opinion of the Subordinate Judge who, however, thought that Art. 138 of the Limitation Act which allows 12 years was preferable. If this applies there is no question of limitation, but it is contended that S. 14 cannot be applied because O. S. No. 163 of 1917 was entirely misconceived. The proviso to S. 42 of the Specific Relief Act states that no Court shall make any such declaration where the plaintiff being able to seek further relief than a mere declaration of title omits to do so. The learned District Munsif was of the opinion that this was a defect of a nature similar to the defect of jurisdiction. It seems that by the proviso to S. 42 of the Specific Relief Act, the Court is deprived of the discretion of granting a declaratory decree in such cases. It therefore seems to me to be rightly said to be of the nature of a defect in jurisdiction. It has been held that the interpretation of S. 14 should be a wide one and there is no doubt on the findings in the present case that the plaintiff was *bona fide* litigating for his rights in O. S. No. 163 of 1917 transposed as O. S. No. 24 of 1920. [See *Kunhikutti Ali* v. *Kunhammad* (2)]. It must be observed that the appellant here claimed an independent title and that the 2nd defendant having put in a claim petition which was disallowed, Ex. C, on 11th July, 1916, and having brought no suit under O. 21, R. 63, cannot now be heard to say that the sale to the 1st plaintiff is not binding upon him (2nd defendant) and his vendee, the 3rd defendant. [*See* also *Surnamoyi Dasi* v. *Ashutosh Goswami* (3)]. It must be observed that the 2nd defendant claimed title to the property independently by virtue of transactions that took place long before the attachment made by the plaintiff in execution of the decree. I fail to see with the Subordinate Judge how the question of *lis pendens* comes in. Second defendant had

2. (1922) 44 M L J 179. 3. (1900) I L R 27 C 714.

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no title to the property. Consequently the question whether the plaintiff's purchase was affected does not arise. It seems to me that on all these grounds the judgment of the Subordinate Judge was right and the second appeal must be dismissed with costs of 1st plaintiff.

T. S. V. *Appeal dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE SPENCER AND MR. JUSTICE ODGERS.

Gopisetti Veeraswami and others ... *Appellants** (*Defendants* 1 *and* 3 *to* 13)

v.

Sagiraju Seetharama Kantayya ... *Respondent* (*Plaintiff*).

Veeraswami v. Seetharama Kantayya.

The Madras Estates Land Act, Ss. 3 (2), (*e*) *and* 189—*Zemindari—Mokhasa village is—If an estate—Lands not excluded at the time of Permanent Settlement in computing assets—Suit to eject tenants—Civil Courts—Jurisdiction—If barred—Taylor's Report and Report of the Circuit Committee—Evidentiary value of—Civil Procedure Code, S.* 100.

Suits were filed in a Civil Court by the *mokhasadars* of three villages situated within the ambit of the Nuzvid Zemindari to eject their tenants. The villages were originally held as *Deshmuk* or *Deshpandya Mokhasas* and were in existence long prior to the Permanent Settlement of 1802. The documentary evidence made it clear that they continued to be part of the Zemindari even after the Permanent Settlement and they were not excluded at the time of the Permanent Settlement from consideration in computing the assets of the Zemindari. The tenants pleaded that the villages constituted 'estates' within the meaning of the Madras Estates Land Act and that S. 189 was a bar to the maintainability of the suits in the Civil Court. *Held,* (1) as the question of the Civil Court's jurisdiction had been raised, even though the question whether the lands were or were not excluded from the assets of the Zemindari may resemble a question of fact, it can be agitated in second appeal, as no Court can confer jurisdiction on itself by wrongly deciding facts necessary to be proved to determine a question of jurisdiction; and (2) the revenue from the *mokhasa* villages having been taken into consideration in computing the assets at the time of the Permanent Settlement, it follows that they were held on a permanent under-tenure under the Nuzvid Zemindari and fell under S. 3 (2) (*e*) of the Estates Land Act and S. 189 barred the jurisdiction of Civil Courts.

Evidentiary value of Taylor's Report and the conclusions of the Circuit Committee pointed out.

Second Appeals against the decrees of the Court of the Subordinate Judge of Kistna at Ellore in A. S. Nos. 95, 97, 94, 92 and 122 of 1920 and 3 of 1922 and the decree of the Court of the Subordinate Judge of Narsapur in A. S. No. 128

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*S A Nos. 1099 to 1103 of 1921, 1186 of 1922 and 1442 of 1923. 22nd January, 1926.

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of 1922 respectively preferred against the decrees of the Court of the Principal District Munsif of Tanuku in O. S. Nos. 733, 728 and 704 of 1914, 820 of 1913, 425 of 1912, 140 of 1921 and 903 of 1920.

A. Krishnaswami Aiyar and *P. Bapiraju* for appellants.

V. Ramadoss and *K. Venkatarama Raju* for respondent.

The Court delivered the following

Spencer, J.

JUDGMENTS :—*Spencer, J.* :—These suits were brought by certain *mokhasadars* in the Kistna District to eject their tenants; and the first question that came up for decision at the trial was whether the villages in question were portions of an estate within the definition of the Madras Estates Land Act. Under S. 3 of that Act an "estate" means "consisting of one or more villages of any of the estates specified in cl. (*a*) which is held on a permanent under-tenure". The three villages concerned in this suit, Goteru, Surampudi and Komaravaram are admittedly situated within the ambit of the Zemindari of Nuzvid. They were in existence before the Permanent Settlement of 1802. The District Munsif was of opinion that they were even more ancient than the zemindari in which they are situated. The question whether they are held on a permanent under-tenure from the Zemindar must depend on whether the revenue from these *mokhasas* was taken into consideration in computing the assets of the Zemindari at the time of the Permanent Settlement. As the question of the Civil Court's jurisdiction over these suits has been raised, we have no alternative but to decide it in these proceedings even though the question whether the land was or was not excluded from the assets of the Zemindari may resemble a question of fact. No Court can confer jurisdiction on itself by wrongly deciding facts necessary to be proved to determine a question of jurisdiction.

A similar question came up for decision in *Lakshminarasimham* v. *Veerabhadrudu* (1), and it was decided therein that certain other *mokhasas* situated in the same Zemindari of Nuzvid were part of an estate as defined in S. 3 (*e*) of the Madras Estates Land Act and that a suit by a landholder *mokhasadar* against his tenants would lie only in a Revenue Court. We are informed that that decision is at present under appeal to His Majesty in Council. In any case the question has to be freshly decided in these appeals upon the records available and on the evidence taken at the trial.

1. (1923) 19 L W 671.

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Spencer, J.

I may first refer to the *Fifth Report from the Select Committee on the Affairs of the East India Company* which in Appendix No. 18 contains the instructions issued in 1799 to Collectors in the Presidency of Fort St. George for the permanent settlement which was carried out in 1802. The Government set out the object of making the settlement as constituting the Zemindars proprietors of their respective zemindaries as estates, fixing the *jumma* or land tax in perpetuity, abolishing all uncertainty of the amount and all disorder and confusion in the collections, removing opportunities for exaction and collusion and simplifying intricacies in the details of the revenue business. The Government state in paragraph 17 that they have resolved to adopt statements of the Circuit Committee as the general standard and in other paragraphs they announce their intention of fixing the assessment, exclusive and independent of all duties and taxes and other collections known as "Sayer", including *Abkari* or tax on the sale of intoxicating liquor, and excluding the salt revenue and independently of all existing alienated lands, whether exempt from the payment of public revenue, with or without due authority (the village *maniams*, or land held by public and private servants in lieu of wages, excepted). Then in paragraph 16 they state:—

"All allowances of cauzees and Government revenue officers (curnums excepted) heretofore paid by landholders, as well as any public pensions hitherto paid through the landholders, are to be added to the amount of *jumma*, and to be provided for by Government, under prescribed regulations."

In paragraph 25 they state:—

"All private lands at present appropriated by the Zemindars and other landholders to the subsistence of themselves and families, as well as all lands held by private servants and dependents, will be considered as forming part of the Circar land, and therewith responsible for the public *jumma*."

It may be seen from this that the only allowances of Revenue Officers excepted were those of Karnams. In Regulation XXV of 1802, which introduced the Madras Permanent Settlement, Karnams were specially provided for. Under S. 11 they could only be removed from their offices by a Court of Judicature; and Regulation XXIX of 1802, which was enacted simultaneously, contained a similar provision in S. 5. The object of the Government in so providing for the Village Karnams apparently was that the services of these village officials were necessary after the introduction of the Permanent Settlement for Government purposes as well as for those of the Zemindar, and they had a duty to render to both masters in keeping correct accounts of the cultivation and the payment of assessment.

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The three villages of Goteru, Surampudi and Komaravaram were held as *Deshmuk* or *Deshpandya mokhasas*. These *Deshmuks* or *Deshpandyas* were originally collectors of revenue under the Zemindars. After the Permanent Settlement the Government would naturally look only to the Zemindar for the realisation of the revenue due to them and would have no necessity to retain any officials to collect the revenue for them from the cultivators of the land. In 1860 the Government entered into an enquiry whether the *mokhasa* villages in the Masulipatam Division of the Kistna District were resumable, and in this connection Mr. Taylor, the Inam Commissioner, sent a report filed as Ex. III. He reported that "these *mokhasas* 208 1|2 in number were grants made by the ancient Zemindars to their relations, dependents or caste-men and peons." He added:

"Some *mokhasas* are likewise held by *Mazumdars* and *Deshpandias*, the former revenue servants of the Zemindars, who have long ceased to perform any service."

His report goes on to refer to the statements prepared by the Circuit Committee, the Special Commissioner's report on the Permanent Settlement of the Nuzvid and Charamahal zemindaries and the statement accompanying it; and he comes finally to the conclusion that the contention of the Zemindar that the revenues of these villages were included in the assets of the zemindari was correct. He observed that there was no ground for classing these *mokhasas* with *lakhiraj* lands excluded by the sanad. The Board of Revenue and the Government agreed with Mr. Taylor and the question of claiming reversionary right to the villages was dropped.

Now Ex. YYYY referred to in Mr. Taylor's report shows these three villages of Goteru, Surampudi and Komaravaram with their average revenue. The total average revenue of all these villages for 8 years comes to pagodas 22,101, fanams 20 and cash 12 3|8. This figure appears again in the abstract Ex. XXI (*b*) under the head of the Nidadavole Phargana and the foot-note states:

"The *mokhasa* villages and grants being immediately under the Zemindar and given or resumed when he pleases are included in Government collections."

Ex. YYYY (1) is a statement of receipts of revenue for four years from Fasli 1205 to 1208 corresponding to 1794 to 1798. This shows that the average receipt per annum was 909 Madras pagodas, and 15 fanams from which a deduction of 834 Madras pagodas and 12 fanams is made as payment made by the Mirasidars to the Circar leaving 75 Madras

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pagodas and 3 fanams as net receipt by the Mirasidars per annum. The learned District Munsif was of opinion that Mr. Taylor made a mistake in thinking that the full value of the *mokhasas* was included in the Government collections. He thinks that the fact that the *mokhasadars* retained 75 pagodas as remuneration for their offices makes all the difference. There is no doubt that these 75 pagodas formed the average perquisites of *Deshmuks* or *Deshpandyas* and that they were service-holders in that respect. But there is nothing on record to show what was done with these 75 pagodas. If this sum represented their remuneration for collecting revenue, the instructions of the Collectors were not to exclude it from the assets because it represented the allowances hitherto paid by the landholders and in future to be provided for by Government. In *Rajah Nilmoni Singh Deo* v. *Government* (2) Sir Barnes Peacock, C. J. of Bengal, observes that Government would not have allowed any portion of their revenue in consideration of private services to be rendered to the Zemindar, and this observation was repeated in the judgment of the Judicial Committee in *Rajah Nilmoni Singh* v. *Bakranath Singh* (3).

The Lower Courts referring to S. 4 of Regulation XXV of 1802 have endeavoured to class these *mokhasas* under the head of *lakhiraj* lands or other lands paying only quit rent. Mr. Ramadoss argued that the amount of quit rent would include anything less than the full assessment and that the amount might vary according to the grant. He referred us to *Veerabhadrayya* v. *Sonti Venkanna* (4) which was a case of an inam excluded from the zemindari assets at the time of the Permanent Settlement which was consequently not an estate within the meaning of S. 3 of the Madras Estates Land Act. This is begging the question which has to be decided. There is no doubt that if an *agraharam* or *mokhasa* is excluded from the assets of the zemindari it is not an under-tenure; but from the documents already referred to it is clear that these *mokhasas* continued to be part of the zemindari estate after the Permanent Settlement was brought into force. In *Venkata Narasimha Appa Rao Bahadur* v. *Sobhanadri Appa Row Bahadur* (5) the Judicial Committee observe that the records of the Circuit Committee could not affect the rights as between the *mokhasadars* and the Zemindar but they, however, agreed

2. (1866) 6 Suth W R 121. 3. (1882) L R 9 I A 104.
4. (1913) 24 M L J 659.
5. (1905) I L R 29 M 52 at 57: 16 M L J 1 (P C).

with the High Court in thinking that they might be good evidence with reference to the system upon which the Government claimed to deal with the Zemindar's property, and it is that question that has fallen to be decided in the present cases. As there appears to be no doubt that the *mokhasas* in question owned by the plaintiffs in these suits were not excluded at the time of the Permanent Settlement from consideration in computing the assets of the zemindari it follows that they are still held on a permanent under-tenure of the Nuzvid zemindari and therefore these suits are by S. 189 of the Madras Act I of 1908 excluded from the jurisdiction of the Civil Courts. It may follow incidentally that under S. 6 of that Act the persons in occupation of ryoti land have acquired permanent occupancy, but this is not for us to decide in the present appeals. Nor is it necessary in these proceedings to make any pronouncement whether the Zemindar has a subsisting right to resume these *mokhasas* seeing that the Zemindar is not a party and the point does not directly arise. Veeraswami v. Seetharama Kantayya. Spencer, J.

The appeals are allowed and the decrees of the District Munsif and the Subordinate Judge are reversed and the District Munsif will be directed to return the plaints to the plaintiffs for presentation in a Court having jurisdiction to try the suits.

The appellants will get their costs from the respondents throughout.

Odgers, J. :—The same question arises in all these appeals. I agree with the judgment just pronounced by my learned brother, but as we are differing from both the Lower Courts, I will add a few observations of my own. The learned District Munsif proceeded on the assumption that Mr. Taylor overlooked the fact that the amount retained by the *mokhasadars* as remuneration for their office was excluded from the computation [*e. g.*, Ex. YYYY (1)] and it was that that made all the difference. The learned Subordinate Judge agreed with this view, namely, that only the *jodi* payable to the Zemindars was taken into account in fixing the *peishcush*. Both the Courts seem to have proceeded on the view that, because these *mokhasa* villages were probably earlier in date than the existence of the zemindari in which they are admittedly situated, therefore they must necessarily be excluded from the zemindari and are therefore not estates within the meaning of the Madras Estates Land Act. It seems to me equally probable that, although these villages may not strictly be Odgers, J.

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grants by a Zemindar to their relations or dependents and all we have to go by is the recital in Ex. YYYY (1) that these villages have been in existence for 400 years when the zemindari came into existence these villages were adopted so to speak by the Zemindar as under-tenures from him and almost certainly with the duty of service attached to them on the part of the *mokhasadars*. There is evidence in this case that the services required from these *mokhasadars* were *Deshmuk*. The villages were so described in Ex. YYYY (1) and the *mokhasadars* are described as *Deshpandyas* or collectors of revenue under the Zemindar. It seems to me, therefore, that we have a case of *mokhasa* villages practically in the position of grants of inams for personal service, and if that is so, *Sri Raja Parthasarathi Appa Rao Bahadur* v. *Secretary of State*(6) is authority for the position that *prima facie* these villages form part of the estate of the zemindari and are resumable by the Zemindar and not by Government. This is the opinion of Mr. Taylor in the Proceedings of the Madras Government, 1860, Ex. III, and it seems to me that we ought not lightly to put aside this opinion which was adopted by Government, Ex. IV, following as it did the conclusions of the Circuit Committee. The argument on the other side depends on the table in Ex. YYYY (1) which shows that the total average receipts from these three villages were 909 Madras pagodas per annum, of which 834 was the amount paid by the *mokhasadars* to the Circar and the balance 95 pagodas is classed under the heading of "Net Receipts by the Mirasidars per annum." It is contended by Mr. Ramadoss for the respondents in accordance with the judgments of the Lower Courts that we must take 834 pagodas as a favourable rent and therefore as outside the operation of S. 3 (*e*) of the Madras Estates Land Act. It seems to me to be equally arguable that of the total collection of 909 Madras pagodas 834 was the rent actually payable in cash and 75 was the rent received by or payable to the Zemindar in kind; that is to say, that 75 pagodas was allowed off the rents in respect of the services rendered by the *mokhasadars*. The Circuit Committee says that services are not to be excluded. [*See* Fifth Report by Firminger, page 174, paragraph 16, which are instructions issued by the Madras Government in October, 1799, when undertaking the Permanent Settlement, and in paragraph 17 it is stated that it had been resolved to accept the statement of the Committee of Circuit as the general standard]. Reference is made to the foot-note

6. (1915) I L R 38 M 620: 26 M L J 39.

to Ex. XXI (*b*), an abstract of the revenue collections taken by the Circuit Committee, namely, that the *mokhasa* villages and grants being immediately under the Zemindar and given or resumed when he pleases are included in Government (therefore Zemindar's) collections. The revenue retained by the present *mokhasadars* after payment of the usual proportion is 8362 Madras pagodas, 17 F. 65 C. That is dealt with by Mr. Taylor in paragraph 4 of Ex. III and he adds : "This is also borne out by the villagevar accounts of the Circuit Committee." There seems to us therefore to be no good reason why Mr. Taylor's Report and the Government Order thereon which have been frequently referred to and relied on by Courts in this Presidency [*see* for latest example *Lakshminarasimham* v. *Veerabhadrudu* (1)] should not be adopted. The investigation of the Circuit Committee took place about 1780, or 150 years ago. Mr. Taylor's report was 65 years ago. These investigators and especially the Circuit Committee were a great deal nearer the origin of these zemindaris than we are to-day and no doubt information available to them which is no longer available to-day. In my opinion, therefore, the greatest weight ought to be given to these reports and opinions, and it seems to me impossible to say that from the fact that 75 Madras pagodas is shown as a receipt by the mirasidars, that the balance must be taken as favourable rent and that the former sum cannot be considered to be a service rent. Section 4 of the Madras Estates Land Act does not include service land at all. For these reasons, I am of opinion that the decisions of both the Lower Courts were wrong and the appeals must be allowed. I agree with the order proposed in this behalf by my learned brother.

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T. S. V. —— *Appeals allowed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE WALLACE.

G. P. Satyanarayanamurthi, Agent to Sri Sri Sri Srinivasa Rajamani Raja Deo, Rajah of Mandasa . . . *Petitioner** (*Complainant*)

v.

Pilla Ramayya . . . *Respondent* (*Accused*).

Satyanarayanamurthi v. Pilla Ramayya.*

Madras Estates Land Act, S. 212 (b)—"Distraint duly made"—Accused preventing his cattle from being driven out of his pen in consequence of distraint.

*Cr R C No. 688 of 1925
(Cr R P No. 567 of 1925). 21st April, 1926.

1. (1925) 19 L W 671.

Satyanarayanamurthi v. Pilla Ramayya.

Where the petitioner for arrears of rent seizes certain cattle said to belong to the accused and was proceeding to drive them out of the accused's pen, when accused interfered and prevented him from doing so, *held*, that the distraint was not complete when the accused interfered and that therefore the accused was "resisting a distraint" within S. 212 (*b*). *Narayana Reddi* v. *Dyvadeenachar*, (1924) I L R 48 Mad 505 distinguished.

The essence of a distraint is the act of taking out of the possession of the real owner and such act will not be completed until the taking out of the possession of the real owner is complete.

Petition under Ss. 435 and 439 of the Code of Criminal Procedure, 1898, praying the High Court to revise the judgment of the Court of the Joint Magistrate of Berhampore in Criminal Appeal No. 97 of 1925, preferred against the judgment of the Court of the 2nd class Magistrate of Sompeta in C.C. No. 83 of 1925.

K. Bhashyam Aiyangar for petitioner.

The Public Prosecutor for the Crown.

V. Narayana Rao for accused.

The Court made the following

ORDER :—The chief point in this case is whether the accused resisted "a distraint duly made" under Act I of 1908. The facts are that the agent of petitioner for arrears of rent seized certain cattle said to belong to accused, and was proceeding to drive them out of accused's pen, when accused interfered and prevented him from doing so. Petitioner contends that this was resistance to a distraint. I am inclined to agree. No doubt a learned Judge of this Court held in *Narayana Reddi* v. *Dyvadeenachar* (1) that cattle are not "produce" within the meaning of S. 212 (*b*), but the offence regarding produce is forcibly or clandestinely removing it *after* it has been duly distrained. In the present case my view is that the distraint was not complete when accused interfered and therefore it is not a case on all fours with *Narayana Reddi* v. *Dyvadeenachar* (1). The essence of a distraint, I take it, is the act of taking out of the possession of the real owner, and such act will not be completed, until the taking out of the possession of the real owner is complete. Here the cattle were still in accused's pen when accused resisted, and I would hold therefore that the act of taking them out of his possession had not been completed when he resisted the taking and that therefore he was "resisting a distraint" within the meaning of S. 212 (*b*). Accused urges that even so it has not been proved that the distraint was legal since

1. (1924) I L R 48 M 505: 48 M L J 215.

the power-of-attorney of prosecution 1st witness has not been produced. Prosecution 1st witness swore that he had a registered power-of-attorney to distrain and this statement has never been challenged by accused until now and I cannot uphold the contention.

The next point is the contention that the cattle were not the accused's because he is divided from his father. The first Court found that unproved. The Lower Appellate Court did not consider it, and it is not worth while sending the case back for a finding on that point.

With this expression of opinion on the main point of law I dismiss the petition.

N. S. *Petition dismissed.*

[FULL BENCH.]

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—MR. JUSTICE SPENCER, MR. JUSTICE KRISHNAN AND MR. JUSTICE BEASLEY.

The Commissioner of Income-tax, Madras ... *Referring Officer**

v.

The Nedungadi Bank, Ltd., Calicut ... *Assessee.*

Income-tax Act (XI of 1922), Ss. 4 (2) and 10 (2) (ix)—Bank in British India—Branches in Cochin and Travancore—Profits or gains—"Received or brought in"—What amounts to—Contributions to the Provident Fund—Deduction of—If an expenditure incurred solely for earning profits.

The Nedungadi Bank, Calicut, has branches both in British India and in the Native States of Cochin and Travancore, the head office being in British India. There was only one balance sheet for the Bank as a whole, and no separate accounts were drawn up to show the profits of the branches. All the income received from the foreign branches was transferred to the Head Office account and all expenditure directly chargeable against revenue was similarly transferred in the accounts of both the Head Office and the branch offices in Cochin and Travancore, with the result that at the end of the year there was no balance in the revenue and expenditure account of the branch offices. *Held,* the profits and gains of the branch offices were received and brought into British India within the meaning of S. 4 (2) of the Income-tax Act and were assessable to income-tax.

Amounts paid by the Bank as contribution to the employees' Provident Fund is not "expenditure incurred solely for the purpose of earning profits" within the meaning of S. 10 (2) (ix) and is not a permissible item of deduction, as until the employee withdraws the amount standing to his credit in the Provident Fund it is not an expenditure but only a liability.

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*R C No. 22 of 1925. 21st April, 1926.

F. B.

The Commissioner of Income-tax, Madras v. The Nedungadi Bank, Ltd., Calicut.

Case stated under S. 66 (2) of the Income-tax Act, 1922 by the Commissioner of Income-tax in his letter No. 1301 of 1925, dated 20th October, 1925 on the following questions:—

"Whether that portion of the Bank's profits, Rs 56,567, which can be conventionally held to have been earned in Cochin and Travancore can be said to have been brought into British India within the meaning of S. 4 (2) of the Indian Income-tax Act?"

"Whether the moneys set aside by the Bank as contributions to its employees' Provident Fund can be regarded as 'expenditure incurred for the purposes of the business' within the meaning of S. 10 (2) (*ix*)?"

The facts giving rise to the reference are—

The Bank has its registered office at Calicut and prepares its consolidated Profits and Loss Account there. It has 16 branches, 11 in British India, 3 in Cochin, and 2 in Travancore State. These latter branches in the States are managed by agents who are under the control of the Head Office at Calicut. All fixed deposit accounts are kept at Calicut and at the end of the year when the year's accounts are made up all the items in the expenditure and revenue accounts of the branches are transferred to the Head Office and incorporated in the accounts there. The Bank has a capital of Rs. 48,38,481 consisting of a share capital of Rs 7,20,720, a reserve of Rs 2,04,829 and a borrowed capital of Rs. 39,12,932, consisting of deposits, etc. As the branches require funds the Head Office transfers capital to them and debits them with interest in the headquarter's accounts.

For the assessment year in question, 1924-25, the Bank returned an assessable income of Rs. 1,18,326 arrived at as follows:—

"The income in British India, according to the separate profits and loss account for British India filed by the Bank and marked A, was Rs 1,07,168. To this, income-tax, super-tax and depreciation were added giving Rs. 1,19,268 and Rs. 942 interest on tax-free securities was deducted leaving Rs. 1,18,326. The Directors' Report to the shareholders which included the consolidated profits and loss account and the balance sheet was also filed marked B. At the request of the Income-tax Officer separate profits and loss accounts were subsequently filed for Cochin and Travancore showing a profit of Rs. 6,565 in Travancore and Rs. 29,874 in Cochin. The original British Indian profit and loss account had contained a sum of Rs. 95,535 being interest due to the Head Office from the branches in Cochin and Travancore, while the Cochin and Travancore profit and loss accounts contained debits of Rs. 58,252 and Rs. 42,385, the bulk of which sums were interest payments to the Head Office by the branches. Subsequently the Bank wrote saying that it wished to revise its original return. The reason put forward was that the Travancore Income-tax Authorities had refused to allow it to deduct from its Travancore income the interest paid to the Head Office at Calicut. It therefore claimed to eliminate the whole sum of Rs 95, 535 being the interest credited from Cochin and Travancore from its original return for the British Indian income and to reduce its British Indian income to Rs. 2,156."

This absurdly low figure was arrived at by debiting the British Indian branches with all the interest on the borrowed capital of the Bank although a large part of that capital had not been used to earn the profits in British India and at the same time claiming that none of the profits shown in the Cochin and Travancore profit and loss accounts had arisen or had been received in British

F. B.

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ascertainable, and no balance is left at the end of the year in the revenue and expenditure account of the branch offices from which a profit and loss account could have been drawn up, all income received by the branches having been transferred to the Head Office account and all expenditure directly chargeable against revenue having been similarly transferred to the Head Office account. The explanation to S. 4 merely states that profits or gains arising outside British India are not necessarily to be deemed to be brought into British India by reason that they are taken into account in the balance sheet. It seems to me that in this case there has been a good deal more done to the profits arising out of the transactions in the branch banks than merely taking them into account in the balance sheet for the information of the shareholders. These sums have been amalgamated with the net profits of the Head Office and out of the amalgamated sum dividends have been paid and Directors have been remunerated, and otherwise the branch banks' profits have been appropriated. Under such circumstances I am prepared to hold that the sums which were appropriated for payments made at the Head Office must be deemed to have been "received or brought into" the Calicut office, which is in British India, and therefore that the whole of the amount shown as net profits of the Bank is liable to income-tax.

The second question is whether the Bank can exclude the amount paid as contribution to the employees' Provident Fund under the heading of "Expenditure incurred for the purpose of the business" within the meaning of S. 10, cl. (2) (*ix*). It appears that the Bank makes itself liable for paying a certain proportion of the sums which are invested with itself for the benefit of its employees. Until the employee withdraws the amount standing to his credit in the Provident Fund, it is no "expenditure" for the purpose of the business but only a liability. The case quoted on behalf of the assessee, *Smyth* v. *Stretton* (1), can be distinguished on the ground that in that case the college invested £35 annually for the benefit of its assistant masters in an insurance fund. The money was actually paid out to the insurance company and was claimed as an expenditure. Upon these facts the High Court held that each master had obtained an addition to his salary on which he was liable to pay tax. The liability of Dulwich College which made those contributions was not considered at all. Even supposing that the College treated these sums as expenditure, it does not follow that the Bank in the present case can

1. (1904) 90 L T 756: 5 Tax Cases 36.

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so treat these amounts which have not been actually expended. I therefore consider that the second question should be answered in the negative.

Krishnan, J. :—This is a reference under S. 66 (2) of the Income-tax Act of 1922 by the Commissioner of Income-tax with reference to the assessment of income-tax of the Nedungadi Bank at Calicut. That Bank has branches both in British India and Travancore and Cochin. The first question submitted for our opinion is:

"Whether that portion of the Bank's profits Rs. 56,567 which can be conventionally held to have been earned in Cochin and Travancore can be said to have been brought into British India within the meaning of S. 4 (2) of the Indian Income-tax Act?"

S. 4 (2) refers to profits and gains of business arising outside British India of a person resident in British India. The Nedungadi Bank has its Head Office in British India, namely, at Calicut. The question is whether the profits and gains of its business carried on in Travancore and Cochin can be said to have been brought into British India so as to be liable to income-tax. The question really turns upon the way in which these profits and gains have been treated by the Bank. The Assistant Commissioner of Income-tax in his order has gone into the facts very fully and has come to the conclusion that the profits and gains made in Cochin and Travancore must be treated as having been brought into British India, and the Commissioner of Income-tax has supported that conclusion. The reasons are fully set out in the Assistant Commissioner's order where he points out the way in which the accounts were kept. All the income received by the foreign branches was transferred to the Head Office account and all expenditure directly chargeable against revenue was similarly transferred to the Head Office account in the accounts of both the Head Office and the branch offices in Cochin and Travancore. The result was that at the end of the year after these transfers took place there was really no balance left in the revenue and expenditure account of the branch offices, the amount being treated as having been transferred to the Head Office account. As pointed out by him, there was a frequent flow of remittances to and from the Head Office and the branch office. Flow of money by book entries can also amount to remittances. There seems to be ample evidence which justifies the Assistant Commissioner's conclusion that the balances with the branches in Travancore and Cochin were really remitted to or brought into the Head

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Office at Calicut. The way in which the profit and loss appropriation account is made out certainly seems to show that the whole income of the branches and the Head Office was treated as one lump sum for the purpose of ascertaining payment of dividends. The balance is dealt with as partly special reserve funds and partly as a general reserve fund, so that the whole profits including the profits of the branches in Cochin and Travancore are dealt with in Calicut. When moneys are remitted without any special allocation to profit or capital accounts, between the branches and the Head Office of the Bank, the contention that the profits were kept back in the branch offices and only other moneys were remitted to the Head Office cannot possibly be accepted. It is quite true that for the payment of dividends there was enough money obtained as profits and gains by the branches in British India alone. But the payment of the dividends were not restricted to those profits as shown by the way in which these accounts were kept by the Bank and its branches. This is not a case merely of reliance being placed upon the balance sheet for the purpose of holding that the profits and gains were brought into British India, which is a matter dealt with by the explanation to S. 4. Here there is very much more evidence to make it quite clear that the amounts earned as profits in the foreign branches were transmitted to the Head Office and treated as so transmitted for the Bank's purposes and for payment of dividends. We are not bound to go into questions of fact in a reference under S. 66 (2). We must take the facts as stated by the Commissioner, and, unless it can be established by the assessee that there is no evidence to support the finding of the Commissioner that the profits were brought into British India, we cannot decide the question in his favour. I am of opinion that there is sufficient evidence to justify the finding of the Income-tax authorities, and on that ground I answer the first question in the affirmative.

The second question referred to us is with regard to the employees' Provident Fund which the Bank has maintained. For every rupee paid by the employee which represents a certain proportion of his pay every month the Bank contributes the same amount and the two amounts are entered in the Bank's books to the credit of the employee in question. It is claimed that the Bank is entitled to deduct the sums contributed by the Bank towards this Provident Fund under S. 10 (2) (*ix*) as expenditure incurred solely for the purpose of earning profits or gains. If the money had been spent by the Bank, no

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doubt S. 10 (2) (*ix*) would apply. But in the case before us it is clear that the Bank has not yet spent the money; all that it has done is that it has made entries in its books admitting liability on its part to pay a certain sum of money to the employee when he retires or goes out of office. That cannot be treated as an expenditure by the Bank. The expenditure will take place only when it pays, and it will be time enough to claim deduction then. The deduction cannot be allowed now. I would therefore answer the second question in the negative.

Costs payable by the assessee will be Rs. 250.

Beasley, J.

Beasley, J. :—I agree.

T.S.V. *Reference answered.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE PHILLIPS AND MR. JUSTICE MADHAVAN NAIR.

Chitturi Venkataratnam and others ... *Appellants* (Defendants)*

v.

Siram Subba Rao *Respondent (Plaintiff).*

Venkataratnam v. Subba Rao.

Registration Act (XVI of 1908), Ss. 17 and 49—Partnership owning immoveable property—Document by a partner releasing his interest in the partnership for consideration—Registration whether necessary—Admissibility.

A document by which a partner releases his interest in the partnership in consideration of a certain amount does not require registration, even though the partnership owns immoveable property. When the partner retires from the partnership by releasing his rights therein, the partnership property still remains the property of the partnership and the action in releasing his rights does not actually extinguish his right in the immoveable property, for he receives his share of the assets on going out of the partnership and the immoveable property still remains the property of the partnership as it was before.

Even if such a deed requires registration, the fact that it is not registered does not prevent its being admissible in evidence under S. 49, as the transaction has the effect of leaving the immoveable property in the same state as it was before, *i. e.*, as property belonging to the partnership.

Appeal under cl. 15 of the Letters Patent preferred against the judgment of Devadoss, J., dated 2nd October, 1924 and passed in S. A. Nos. 848 and 849 of 1922 preferred to the High Court against the decrees of the Court of the Subordinate Judge of Masulipatam in A. S. Nos. 200 and 190 of 1921 respectively in O. S. Nos. 206 and 65 of 1917, District Munsif's Court, Masulipatam.

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*L P Appeal Nos. 42 and 43 of 1925. 26th February, 1926.

Venkataratnam v. Subba Rao. — Phillips, J.

A. Krishnaswami Aiyar for appellants.

V. Ramadoss for respondent.

The Court delivered the following

JUDGMENTS :—*Phillips, J.*:— *L. P. Appeal No.* 42 *of* 1925 :—The only question for consideration in this appeal is, whether the document, Ex. III, is admissible in evidence. It purports to be a *kararnamah* or release of partnership share and it recites that in consideration of a sum of Rs. 2,100 settled by the mediators, the executant relinquishes his share, title and interest in the partnership business. Admittedly the partnership was possessed of immoveable property and the learned Judge in second appeal has held that as the document is one creating or extinguishing an interest in immoveable property within the meaning of S. 17 of the Registration Act, it requires registration and is therefore inadmissible in evidence as not having been registered. The learned Judge finds that this document is a relinquishment of the executant's share in the partnership and that

> "instead of Subba Rao being paid his share of the assets of the partnership, the partners entered into an arrangement by which he purported to release his right in the partnership."

Inasmuch as he received a consideration of Rs. 2,100 for this release that amount is clearly the amount settled by the mediators as being the share in the assets of the partnership to which he was at that time entitled. The real question at issue is whether this is a document surrendering an interest in immoveable property. Under S. 253 of the Contract Act all partners are joint owners of the partnership property, but the share of each partner in the partnership property is the value of his original contribution increased or diminished by his share of profit or loss, *i. e.*, he can only claim to receive his share of the assets of the partnership after all accounts have been taken. This is clearly shown in a case reported in *Sudarsanam Maistri* v. *Narasimhulu Maistri* (1). In that case the plaintiff sued for a share in the partnership which admittedly was possessed of immoveable property and it was held that his suit was barred by limitation. It was argued that in respect of the immoveable property the suit would be in time, although as a suit for dissolution of partnership it was barred by limitation. It was, however, held that the only suit which he could bring would be for winding up the business of the partnership and for distribution of the surplus and not

1. (1901) I L R 25 M 149 : 11 M L J 353.

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a suit for partition of the partnership properties. Similarly in *Gopala Chetty* v. *Vijayaraghava Chariar* (2) it was held by the Judicial Committee that a suit to recover a share in property which fell in after the dissolution of the partnership could not be maintained when the right to sue for an account was barred by limitation. These two cases are certainly authority for holding that a partner as such cannot sue for a specific share in the partnership property, but his only remedy is to sue for taking accounts and ascertainment of his share. A question similar to the present one arose in *Jaharmal* v. *Tejram Jagrup* (3), where it was held by Jardine, J., that a certain document transferring a share in the assets of a firm which was possessed of immoveable property did not require registration. Telang, J., however, held the contrary view; Jardine, J.'s judgment is based on the English Law which he discussed at great length. Under the English law the share of a partner in the assets of the partnership is undoubtedly personalty and not realty, but it is contended here that that does not conclude the case and that where a document relinquishing a share is executed that document must be registered. The question is not free from doubt in England. There is a case reported in *Gray* v. *Smith* (4) where an agreement to withdraw from a firm was under consideration and it was held by Kekewich, J., that such an agreement required a document under S. 4 of the Statute of Frauds inasmuch as it conveyed an interest in land. In appeal the point was not determined, but Cotton, L. J., expressed his concurrence with Kekewich, J.'s view. On the other hand in *Forster* v. *Hale* (5) it was held that the lease of a colliery was a mere incident in the partnership and no signed writing was necessary. The same principle was adopted in *Dale* v. *Hamilton* (6). In *Watson* v. *Spratley* (7) it was held that a contract to sell a share in a joint-stock company did not come within the Statute of Frauds. At page 236 Martin, J. observed :—

"Indeed land or real property is the main substratum of their joint-stock or partnership property, and their profits are directly obtained from its use. It is true, the legal interest in such real property is generally vested in the corporation and not in the individual partner or partners as in the cost book mine; but the interest of the shareholder in the great incorporated joint-stock companies and in the smallest mine conducted upon the cost book principle is, in its essential nature and quality, identical. In both, the shareholder has only the

2. (1922) I L R 45 M 378: 43 M L J 505 (P C).
3. (1893) I L R 17 B 235.
4. (1890) 43 Ch Dn 208.
5. (1798) 3 Ves 696.
6. (1846) 5 Hare 369.
7. (1854) 10 Ex 222.

right to receive the dividends payable on his share, that is, a right to his just proportion of the profits arising from the employment of the joint-stock, consisting indeed partly of land, but whilst he holds his share he has no interest or separate right to the land or any part of it. He is, indeed, interested in the employment of it, but he cannot proceed against it directly for anything which is due to him, or make any part of it his own, for the purpose of satisfying any demand which he may have as shareholder. He is not in the situation of a mortgagee who has a direct interest in the land; or of a joint-tenant, or tenant-in-common, who may make a part of it his own in severalty."

Again in *In re De Nicols*: *De Nicols* v. *Curlier* (8) Kekewich, J. observed :—

"It is settled that there may be an agreement of partnership by parol, notwithstanding that the partnership is intended to deal with land, and that to an action to enforce such agreement the plea of the statute of frauds will not avail."

He quotes for his authority *Forster* v. *Hale* (5) and *Dale* v. *Hamilton* (6) but he still adheres to the view expressed by him in *Gray* v. *Smith* (4). There seems to be some conflict therefore between the decisions of English Courts, and I think the question must be examined to see whether this deed of release is really a document which extinguishes an interest in immoveable property.

It is well-settled law that a contract for the sale of shares in companies owning immoveable property is not affected by the Statute of Frauds, and it is somewhat difficult to see what distinction can be drawn between the interest of a shareholder in immoveable property belonging to the company and that of a partner in immoveable property belonging to the partnership business. A shareholder, although he may not have any power to dispose of the property of the company, yet has an interest in it as it is out of such property that he derives his share in the profits of the company. Similarly in a partnership business a partner may be a co-owner in the property, but he has no right to ask for a share in that property but only that the partnership business should be wound up, including therein the sale of the immoveable property, and to ask for his share in the resulting assets. Before a partner releases his right in the partnership property that property belongs to the partnership and incidentally to him as a member of the partnership but not in his individual capacity. When, therefore, he retires from the partnership by releasing his rights therein, the property still remains the property of the partnership and the action in releasing his rights does not actually extinguish his right in the immoveable property, for

4. (1890) 43 Ch D 208.
5. (1798) 3 Ves 696.
6. (1846) 5 Hare 369.
8. (1900) II Ch Dn 410.

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he receives his share of the assets on going out of the partnership, and the immoveable property still remains the property of the partnership as it was before. I would therefore hold that Ex. III does not require registration. Even if this view is not correct, I think there is another ground for holding that Ex. III is admissible in evidence based on S. 49 of the Registration Act, which says that no document required by S. 17 to be registered shall be received as evidence of any transaction affecting such property. Although, therefore, this release deed may require registration under S. 17, yet it may be received as evidence if it is not received as evidence of any transaction affecting such property. Here the transaction has the effect of leaving the immoveable property in the same state as it was before, namely, as property belonging to the partnership. The fact that that partnership consists of one partner less than before does not affect the immoveable property. This seems to me to be clear from the decisions regarding shares in joint-stock companies, whether incorporated or unincorporated. The property remains the partnership property and is not affected by the change in the body of persons owning it. In this view then Ex. III is admissible in evidence, even if it requires registration as a document extinguishing an interest in immoveable property. I must, therefore, come to the conclusion that the judgment of the learned Judge is wrong and that the decree of the Subordinate Judge must be restored with costs both here and in second appeal.

Appeal No. 43 of 1925 follows this and there will be a similar order in that appeal.

Madhavan Nair, J.

Madhavan Nair, J. :—I agree and have nothing to add.

N. S. *Appeal allowed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE ODGERS.

Addanki Lakshmanacharyulu ... *Appellant** (*Plaintiff in S. A. No.* 1090 *of* 1923 *and petitioner in C. M. P. No.* 3860 *of* 1923)

v.

Madduri Venkataramanujacharyulu ... *Respondent in both* (*Defendant*).

Lakshmanacharyulu v. Venkataramanujacharyulu.

Civil Procedure Code, O. 6, R. 17—Plaint—Amendment of—Effect to deprive defendant of plea of limitation—If to be granted—Limitation Act, S. 19—Acknowledgment—Initials—If sufficient.

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*S A No. 1090 of 1923 and C M P No. 3860 of 1923 2nd March, 1926.

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An amendment of the plaint should not be allowed if its effect is to take away a valid defence under the law of limitation.

For the purposes of a valid acknowledgment within S. 19 of the Limitation Act, initials are not equivalent to signature. *Ammayee* v. *Yalumalai*, (1892) I L R 15 M 261 referred to.

Second Appeal against the decree of the Court of the Subordinate Judge of Bezwada in A. S. No. 89 of 1921 preferred against the decree of the Court of the District Munsif of Nuzvid in O. S. No. 859 of 1919.

Petition praying that in the circumstances stated in the affidavit filed therewith the High Court will be pleased to permit the petitioner to amend the plaint by correcting the date of the Rs. 800 item given as 28th January, 1916 into 28th November, 1916 in paragraph 3 of the plaint in the said S. A. No. 1090 of 1923 on the file of the High Court.

K. N. Rajagopala Sastri for *B. Satyanarayana* for appellant.

Ch. Raghava Rao for respondent.

The Court delivered the following

JUDGMENT :—This is a suit for money brought by the plaintiff against the defendant, who are husbands of sisters. The first Court held that no such indebtedness was proved. On appeal to the Lower Appellate Court, the Subordinate Judge held that an amount of indebtedness was proved. There is one curious feature about this case, and that is, that the plaint sets forth the borrowings by the defendant of certain sums on specific dates and the only item with which we are concerned here is Rs. 800 stated in the plaint to have been borrowed on 28th January, 1916. The date given however in the additional issues framed by the District Munsif in the case is 28th November, 1916, and in the summary of the evidence the same date appears. This case is a very striking example of the great danger of employing figures instead of words in any kind of writing that really matters. It is all very well to do it at the top of letter-paper or things of that sort, though even so it may be that the date will become important, and the whole of this case hinges on the fact that 28th January, 1916, was written all in figures. In the learned Subordinate Judge's setting out of the case he also says "Rs. 800 on 28th January, 1916" and according to the learned vakil for the appellant this discrepancy was actually never discovered until after the conclusion of the case in the Lower Appellate Court. It seems almost incredible that the case should go through the Courts with the plaint alleging one

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date and the witnesses and the Judges setting out a different date. However, that is the fact, and I take it that the statement of the learned vakil for the appellant is accurate. A petition for review was taken to the learned Subordinate Judge while the admission of the second appeal was pending. That was refused on the ground, and it seems to me a substantial one, that it was on the basis of the plaint that the plaintiff went to trial and that the issue was decided and as foundation of his right to this sum of Rs. 800 he alleged a borrowing and lending on the 28th January, 1916. The question is, should this mistake, if it is one, be allowed to be corrected here in second appeal ? Much stress has been laid on *Muhammad Sadiq* v. *Abdul Majid* (1) where the Court allowed the plaintiff to amend his plaint so as to claim 17 biswansi shares instead of 15 biswansi shares on the ground that the amendment is a correction in the description of the property. It was attempted to be argued here that the date was merely a description of the debt, but I am unable to accept this because if it were a mere description which could be corrected it is obvious that the sooner we get rid of the limitation law the better. It simply reduces that to futility. Another case relied on is *Seshamma* v. *Chennappa* (2). That was a case where the learned Judges in second appeal thought that as the plaintiffs had not been appointed executors by the will the plaint might be amended by substituting the adopted son as plaintiff with one of the present plaintiffs as next friend. The objection, it will be noticed, was taken by the District Judge himself and the learned Judge thought that the suit should not have been dismissed without giving the plaintiffs an opportunity to amend. It is perfectly clear there that the amendment was more or less a formal matter. The executors had sued under the mistaken impression that they were executors by implication. The question was, how was the subject-matter of the suit to be preserved. It was really, as pointed out by the learned vakil for the respondents, a question under O. 1, R. 10, Civil Procedure Code. I do not think either of the cases quoted is really authority for asking me to amend in this case, and, for this very strong reason, that if the amendment is allowed, the defence of limitation which succeeded in the Lower Appellate Court obviously falls to the ground and it is a cardinal maxim of the law of amendment not only that you should not amend so as to change the cause of action but you should not amend in such a way as will take away a valid defence under the law

1. (1911) I L R 33 A 616. 2. (1897) I L R 20 M 467.

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of limitation. On the merits it is very difficult to come to the conclusion that this is a mistake. As I have already said it was allowed to go through two Courts unchallenged and when the learned Subordinate Judge comes to give his decision on the next point in the case, *i. e.*, whether this debt has been revived by acknowledgment, again the foundation is given as 28th January, 1916, with regard to this sum of Rs. 800. For all these reasons I am of opinion that it would be distinctly wrong to allow this amendment in second appeal.

The next point is, was the learned Subordinate Judge wrong in holding that Exs. B and C, two letters, did not amount to acknowledgment ? He says that the acknowledgment is not specific and holds against the plaintiff for that reason. Neither of these acknowledgments so-called, Exs. B and C, is signed. They are at best initialled ; I say " at best " because the translator of Ex. C has only been able to decipher the initial " M ". It is said that the words " I shall pay you Rs. 100" may be 1000. The original is most suspiciously and unfortunately blurred at exactly that figure. If it is 1000 it is said it must cover the Rs. 800. If it is 100 we do not know. It is simply an acknowledgment of liability. Various cases were quoted for the appellant under S. 19 of the Limitation Act, but on examination they will be found to be cases of open and current account and it is well known that an acknowledgment of indebtedness by one party who has any open and current account with another is much favoured in the law on this point. There is no open and current account between these two people.

There is a further question and that is whether, in spite of the provisions of S. 19, namely, that the acknowledgment has to be made in writing signed by the party, etc., initials will do. An old case *Ammayee* v. *Yalumalai* (3) was referred to. That was the case of a will and initials affixed by the attesting witness. It is said *obiter* that initials are equivalent to a signature to an acknowledgment under the Limitation Act though no such authority is quoted in the judgment; and this morning I have been referred to an English case of *Lord St. John* v. *Boughton* (4). There it was held the acknowledgment of a debt in writing signed by a trustee or his agent is sufficient. The trustee owing to gout in the hand could not write and the letter was written by an amanuensis who concluded "For Thomas Townsend, Lt." It was sworn that the

3. (1892) I L R 15 M 261. 4. (1838) 9 Sim. 219

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letter was written by Miss Laura Townsend, daughter of the trustee, according to her father's dictation and that it was signed by her in his presence. That makes all the difference. Here it is true that the plaintiff says that the whole of the letter Ex. C is in the handwriting of the defendant but he certainly does not say that he saw the defendant sign, nor has any evidence been offered to connect the defendant with the initials which appear in Ex. B but may or may not appear in Ex. C. Ex. B is in its contents vaguer than Ex. C and in my opinion the learned Subordinate Judge is right in saying that neither of these acknowledgments is specific, but I am prepared not only to stand on that but also on the point concerning the initials themselves. It seems to me therefore that the appeal fails on all grounds and must be dismissed with costs.

The petition for amendment of plaint is dismissed.

T. S. V. *Petition and appeal dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE RAMESAM.

Vikrala Ramachandracharyulu ... *Appellant** (*Plaintiff*)

v.

Vikrala Srimath Rangacharyulu and another ... *Respondents* (*2nd Defendant and L. R. of 1st defendant*).

Ramachandracharyulu v. Rangacharyulu.

Registration Act, S. 17 (2) (v)—Co-owners—Agreement to divide properties in certain shares—If requires registration—Test—Implied undertaking to execute another document—Plaint—Amendment in second appeal—Suit for specific performance—Prayer for possession—If can be added.

Three Hindu reversioners who were entitled to certain properties in equal shares filed a suit for recovering the same from persons to whom they had been improperly alienated by the widow in possession. During the pendency of the suit they executed an agreement according to which one of them was to finance the litigation entirely and in consideration therefor was to get an extra share. In a suit for specific performance, *held,* the agreement did not require registration. Though it did not expressly state that another document would be executed, as it did not by itself convey any property there was an implied undertaking to execute a further document. The test in all such cases is not whether a document expressly contemplated execution of another document, but whether by itself it created any right to immoveable property. Case-law referred to.

An amendment of a plaint can be allowed for the first time even in second appeal, if justice requires it.

In a suit for specific performance possession can also be claimed where such a relief is consequent on a decree for specific performance.

*S A No. 559 of 1923. 2nd December, 1925.

Second Appeal against the decree of the Court of the Subordinate Judge of Nellore in A. S. No. 6 of 1922 (A. S. No. 77 of 1921, District Court, Nellore) preferred against the decree of the Court of the Additional District Munsif of Nellore in O. S. No. 105 of 1919 (O. S. No. 431 of 1917, Temporary District Munsif's Court, Gudur).

M. Balasubramania Mudaliar for *A. Krishnaswami Aiyar* for appellant.

K. Bhashyam Aiyangar for respondents.

The Court delivered the following

JUDGMENT :—This Second Appeal arises out of a suit for specific performance of an agreement between co-owners to divide their property in a particular way.

The facts may be more specifically stated. One Appalacharlu was the last owner of the suit property. He died about 70 years ago leaving his widow Lakshmamma and brother's widow Seshamma. Lakshmamma died in 1866. At the time of her death the plaintiff, a grandfather Lakshmanacharlu, the 1st defendant's father Seshacharlu and the 2nd defendant's grand-uncle Sreenivasacharlu were the reversioners entitled to the property. But after taking possession they found that they had to arrange for the maintenance of Seshamma. So, they entered into an agreement with Seshamma under which they allowed her to remain in possession until her death and they or their heirs should take the property after her death. Seshamma died in 1895. (*Vide* Ex. BB-2, the date in para. 6 of the plaint in the printed papers is incorrect). At the time of her death, plaintiff's paternal uncle Seshacharlu, the 1st defendant and the 2nd defendant's father represented the three reversioners of 1866, and these were entitled to the property. But Seshamma disposed of the property in her possession by a will and by several sale deeds though she had no right to do so, and the three persons entitled to the property had to bring a suit. Such a suit was filed as O. S. No. 30 of 1907 of the District Court of Nellore. It was afterwards transferred to the Temporary Subordinate Court and became O. S. No. 60 of 1913. In that suit, the 1st plaintiff was the present 1st defendant, the 2nd plaintiff was the present 2nd defendant's adoptive father and the 3rd plaintiff was the present plaintiff's uncle. Before filing the said suit, the three plaintiffs therein entered into an agreement

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dated 5th August, 1907, Ex. EE, under which it was agreed that in consideration of the 3rd plaintiff (uncle of the present plaintiff) conducting the suit by instructing vakils and in other ways and, in consideration of the document being in his possession, 1|8 of the properties recovered should be given to him solely and the other 7|8ths should be taken in equal shares or in other words while the 1st plaintiff and 2nd plaintiff was to get 7|24, the 3rd plaintiff was to get 10|24. While the suit was pending before the Sub-Judge they entered into another agreement modifying the former agreement, Ex. FF*, dated 25th October, 1909. In this agreement, it was stated that the first two plaintiffs were unable

*EX. FF.

(*Letter, dated 25th October*, 1909).

Vikrala Bhashyakacharyulu and do. Krishnamacharyulu write to say as follows:—

"Now, for recovery of the property of Vikrala Appalacharyulu, we three filed a suit in the District Court of Nellore. That suit having been decided against us, we were put to considerable trouble and loss, and preferred an appeal to the High Court. With the idea of engaging a big vakil in that matter, we engaged V. Krishnaswami Aiyar Garu. As he was soon after elevated to the Bench, we had to engage a big vakil again. We having been pressed by defendants for costs and not having been able to get money and pay the costs in time, we were obliged to stop further proceedings in the affair. So, on 5th August, 1907, we entered into an agreement to refer the matter to arbitration, chose M. R Ry. Mangu Ramanuja Rao, Thalpur Appiah, Dittathi Ramakrishnayya and others as *Panchayatdars*, and agreed to abide by their decision. So, agreeably to their decision, you yourself shall bear the expenses henceforward, and get the suit prosecuted to a successful termination. For this an able and efficient vakil has to be engaged. The fee payable to him, and the charges for printing the record, and, if the suit be remanded to Nellore (Court) for enquiry in full then the costs in that Court and if again an appeal were to be preferred, the costs thereof, and the costs, if any, payable to the defendants henceforward, all these, you shall bear for yourself. If ever we become possessed of means, and give you money then you shall take that money. Whether you win or lose the suit, you have no business to ask for money. We shall, however, at our own expense, render you assistance in furnishing you with evidence or the helping you with word of mouth. If, facing all these difficulties and disadvantages, you win the suit, then, we shall, in consideration of this, give you as share due to a redeemer or saviour, one-eighth, as already agreed in writing, and; for your having spent your own money in respect of our shares also; another one-eighth, making in all one-fourth out of the entire properties that may be recovered by us, and bring the remaining properties to apportionment into the equal shares amongst us three. We have written and given this letter in token of our having agreed to the decision of the *Panchayatdars* in this way, and for your confidence.

(Signed) *Vikkirala Bhashyacharyulu.*

" *Krishnamacharyulu.*

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to find their share of the expenses and therefore Ex. EE, the earlier agreement was executed. It was then provided that all the further expenses of the suit should be borne by the 3rd plaintiff and in consideration of this instead of the old 1|8, 1|4 share was to be kept apart for the 3rd plaintiff and the other 3|4 was to be taken in three shares or in other words the first two plaintiffs were each to get a fourth share while the third plaintiff was to get a half-share. Some time after this agreement the 2nd plaintiff therein died and his son, that is the present 2nd defendant, was added as the 4th plaintiff, and the 3rd plaintiff died and his son, that is the present plaintiff, was added as the 5th plaintiff. It may be added that the parties originally engaged the late Mr. V. Krishnaswami Aiyar (afterwards a Judge of this Court) as their vakil and had to incur heavy expenses. The Subordinate Judge decreed the suit only in respect of item 1 of the present suit and in that item instead of decreeing the whole he decreed only 5|6, that is, one-third of the 1st plaintiff and one-third of the 4th plaintiff, but only 1|6 instead of 1|3 of the 5th plaintiff. As to another item, item 7 of that suit, he dismissed the suit as beyond time. This was in 1914. There was an appeal to the District Court of Nellore. It was filed in respect of the 1|6 share of the 5th plaintiff disallowed by the Sub-Judge and the other item, the claim for which was held to be barred. It appears that the appeal was filed with insufficient stamp and it was returned for payment of deficient stamp duty on 30th July, 1914. After several extensions of time allowed it was stated that the 1st and 2nd appellants did not wish to continue the appeal and the deficient stamp duty was paid only for the 3rd appellant who continued the appeal. This was on the 2nd of September, 1914. The appeal was disposed of in March, 1916. The result of it was that the 3rd plaintiff's appeal was fully allowed. He got his 1|6 share disallowed out of the item decreed by the Subordinate Judge and his own 1|3 share of item 7. The other shares of item 7 were not decreed as the other appellants did not prosecute the appeal. Looking at the reasons of the District Judge (*vide* Ex. BB) one would think they too would have got a decree for their shares. It is obvious that in the interval between the filing of the appeal and the 2nd of September, 1914 the first two appellants broke away from the 3rd appellant either because they entered into a private arrangement with the opposite party or for some other reason. Soon after the disposal of that appeal, that is on 7th March, 1917,

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the present suit was filed for specific performance of the agreement in Ex. FF. A number of objections were taken by the defendants. They denied the genuineness of the agreement of 1866 and of Exs. EE and FF. They denied that the plaintiff and his uncle performed their part of the agreements. They also contested that plaintiff is not entitled to the benefit of the agreement as the heir of his uncle. All these points were found by both the Courts below in plaintiff's favour and against the defendants. But in spite of this, the defendants succeeded in both the Lower Courts on certain technical objections. The District Munsif found that Exs. EE and FF amount to a sale and not being registered are ineffective to pass any property to the plaintiff. He also held that the plaintiff's remedy is to refer the matter to arbitrators and not to sue. On appeal the Subordinate Judge held that Exs. EE and FF are inadmissible for want of registration and dismissed the appeal. The plaintiff files the second appeal.

Exs. EE and FF do not purport to be sale deeds. They purport to be agreements to divide the property in certain shares. Nor do they purport to convey any property. In my opinion, they are merely agreements to do all that is necessary on the part of the promissors to give effect to the division agreed upon. This remark is particularly true of Ex. FF which is executed by the two defendants in favour of the plaintiff unlike Ex. EE. It is true they do not expressly say that another document will be executed, but I do not think this is necessary to bring the documents within the exempting cl. 17 (*v*) of the Registration Act. Seeing that they do not by themselves purport to convey property, it follows that if they are ineffective without another document there is an implied undertaking to execute a further document. In this respect I think this case is a far better case than the decision in *Mangamma* v. *Ramamma* (1). In that case the document while contemplating the execution of another document also purported to be a sale on its date and to place the vendee in possession. I must state there are several unreported decisions of this Court taking the same view. So early as *Adakkalam* v. *Theethan* (2) it was held that a mere agreement does not require registration and is admissible for the purpose of obtaining specific performance. In *Nagappa* v. *Devu* (3) it was held that

1. (1912) I L R 37 M 480. 2. (1889) I L R 12 M 505.
3. (1891) I L R 14 M 55.

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even where a document purports to be a sale deed it is inadmissible for want of stamp or registration, it is admissible as an agreement to sell in a suit for specific performance. See also *Upendra Nath Banerjee* v *Umesh Chandra Banerjee*(4). The same view is taken in *Indar Singh* v. *Munshi* (5). The test in all such cases is not whether a document expressly contemplated execution of another document, but whether by itself it created any right to immoveable property, and if it did not, then it does not require registration. See *Rajangam Aiyar* v. *Rajangam Aiyar* (6). Whatever view we take therefore of Exs. EE and FF they are not inadmissible for want of registration.

It seems that two possible views may be taken of these documents. As the three sharers were tenants-in-common of the property, every one is strictly entitled in the theory of law to every particle of the properties, and therefore when they agreed to divide in certain shares it cannot be said there is a conveyance by some sharers in favour of another even though but for the agreement the shares would have been different. Where every one is owner of every part of the property there is nothing to convey, and it is only a question of shares. The inequality of shares may be due to various reasons. In all such cases, a mere agreement to divide is enough to enable the party who benefits by it to sue for specific performance of an agreement and to recover possession. The judgment of this Court in S. A. No. 760 of 1913 is an example of such a suit. In that case, a number of sharers who resisted the suit by another, relying on adoption, entered into an agreement by which one of them in consideration of supporting the plea of adoption by the others was to get a share larger than what he would be otherwise entitled to. The suit in which they were all defendants having been dismissed and the defendants having been given the shares to which they were entitled without the agreement, a subsequent suit was afterwards filed to enforce the agreement and to get the extra share. Both the Lower Courts dismissed the suit. In appeal, the High Court (Sankaran Nair and Ayling, JJ.) allowed the Second Appeal holding that the agreement was binding as a settlement of a doubtful matter. It is true the question of registration was not discussed in Second Appeal but was taken in review and

4. (1910) 15 C W N 375. 5. (1919) I L R 1 Lah 124.
6. (1922) I L R 46 M 373 at 381 : 44 M L J 745 (P C).

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was disallowed. In the present case also, as the three plaintiffs were out of possession of the property and had to litigate to acquire them, it may be said the matter is doubtful and a settlement settling the shares in a particular way may be said to be a settlement of a doubtful matter, in which case it will not fall under the Transfer of Property Act and does not require to be registered even if it amounts to a complete transaction.

But a second view is possible ; it may be said that Ex. FF is merely an agreement to do the needful for conveying an extra share and by itself cannot give a right to the plaintiff to obtain a certain share. If so, all that the plaintiff has to do is to pray for a direction directing the defendants to execute the document if the Court so thinks fit. It is true that the original plaint did not contain any such prayer. After the appeal was filed in the Lower Appellate Court the plaintiff applied for permission to amend the plaint by the addition of such a prayer. The Subordinate Judge dismissed the appeal, but did not deal with this prayer for amendment and dismissed the petition without giving any specific reasons and the vakil for the appellant complained of this before me. Seeing that all the defendants' objections in the case are technical and they have really nothing in the merits it seems to me that in the interests of justice this is a case in which the Lower Appellate Court ought to have the amendment on such terms as it thought fit. An amendment of the plaint was even allowed for the first time in second appeal. See *Dronan Raju Ramayya and others* v. *Peddayya* (7). In this case it ought to have been permitted in the Lower Appellate Court and I accordingly allowed the plaint to be amended by the addition of such a prayer. I even think that the direction for the execution of an ancillary document might well be included under prayer C of the original plaint "such other relief as the Court thinks fit under the circumstances." However, as the plaintiff was not diligent enough I think he must pay the costs of the defendants in the first two Courts.

Mr. Bhashyam for the respondents raised three minor objections. First, he said that the plaintiff was guilty of some fraud, relying on para. 4 of the written statement and that a finding on it is to be called for. There is no issue on it and the only issue as to plaintiff's conduct is the third issue, namely, whether he performed his part of the agreement.

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7. (1911) 10 M L T 116.

This has been found in favour of the plaintiff. Mr. Bhashyam originally suggested that the plaintiff fraudulently did not pay the deficient Court-fee in the appeal in the former suit, but the facts I mentioned above from Ex. BB-1 show that after the other appellants withdrew the 3rd appellant paid his own share of the Court-fee. I therefore do not think there is any point requiring fresh enquiry.

The second objection taken by Mr. Bhashyam is that the suit for possession is not maintainable along with the suit for specific performance. He relied on the Letters Patent decision in *Rangayya Reddi* v. *Subramania Aiyar* (8). One of the Judges dissented. But apart from it, I think that case is distinguishable from the facts before me. In that case the suit for specific performance was against one person and the relief for partition was claimed against other persons who are not parties to the first prayer and this fact furnished the *ratio decidendi* of the decision. The English cases relied on by Wallis, C. J., for instance, *De Hoghton* v. *Money* (9), also support the distinction. It is unnecessary to refer to all of them. The recent decision of the House of Lords in *Mildred Howard* v. *William Miller* (10) also illustrates the distinction. In the present case the defendants are persons against whom both the reliefs, namely, specific performance and possession were asked. In such a case all reliefs consequent on the decree for specific performance ought also to be granted. (*See* Fry on Specific Performance, S. 1402.)

The third objection raised by Mr. Bhashyam is that the plaintiff's remedy is to refer the matter to arbitrators and not to bring the suit. He relies on Ex. EE, the last sentence at page 1 of the documents. This clause is not repeated in Ex. FF. He contends that the clause remained operative after the execution of Ex. FF. On reading the two documents together, I do not agree with this contention. The intention is to drop the clauses from Ex. FF. It seems to me that Ex. FF is complete in itself and did not intend any further reference to Ex. EE. Again I do not see how one party can refer a matter to arbitrators (who are not even named) without the other co-operating. Thirdly, the document EE refers to advice of mediators and not to decision of arbitrators and the advice of mediators can be taken and acted

8. (1917) I L R 40 M 365: 32 M L J 575 (F B).
9. (1866) L R 2 Ch Ap 164. 10. (1915) A C 318.

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upon only if all the three parties go to them. For all these reasons, I disallow this contention..

The only question that remains is, what is the relief to which the plaintiff is entitled? There are two items in the suit, the first item was divided into 6 shares of which each of the three parties took two. According to the agreement, plaintiff ought to have another sixth, that is, he ought to have one out of the four shares in the hands of defendants. Instead of this he claimed 1 1|2 out of the four shares in the hands of the defendants. He is entitled only to a half-share each from the two shares of each of the defendants. There will be decree directing that the plaintiff will be entitled to get 1|4 of such share which each defendant has in item 1. He will be entitled to proportionate costs of this throughout, but he will pay proportionate costs on the disallowed half-share in Second Appeal. As to the second item, the parties never prosecuted the appeal together, and the plaintiff wants now a share in item 1 in substitution of what he would have got from the other item if all had stuck to their agreement. I do not think he is entitled to this, and this claim will be dismissed with proportionate costs in Second Appeal. I have already said that the appellant will pay all costs of the respondents in both the Courts below. The plaintiff will be also entitled to mesne profits from the date of suit till delivery of possession on the item decreed. The District Munsif will ascertain in the past profits and pass a final decree. The future profits will be determined in execution.

T. S. V. *Appeal allowed in part and dismissed as to the rest.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE ODGERS AND MR. JUSTICE VISWANATHA SASTRI.

Chavakula Ammanna ... *Appellant** (*Plaintiff*)

v.

Chavakula Satyanarayana and others ... *Respondents* (*Defendants* 1 *and* 3 *to* 6).

Ammanna v. Satya-narayana.

Hindu Law—Adoption—Power to adopt given by father-in-law—Exercise of power long after death of father-in-law—Consent of nearest sapindas if necessary—No objection raised by sapindas—Effect of—Rule as to divesting of estate—If applies.

S, a Hindu, after the death of his son executed a document in favour of *D*, his daughter-in-law, in the following terms: "As you asked me for my con-

*S A No. 186 of 1923. 6th October, 1925.

sent in order to adopt a boy for the prospering of our family, I have given my consent, so that you may adopt at your pleasure, whomsoever you may like. whenever it is necessary, from among the sons of your brother, or the sons of my brothers, or their daughters' sons or their sons' sons............You are hereby authorized to keep the whole of the property mentioned herein under your management throughout your lifetime and to pass the said property to the adopted son either after your death or at any time at your pleasure, meanwhile maintaining the adopted son at your own cost." *S* died soon afterwards. Nearly 19 years thereafter, *D* made an adoption under the power conferred by *S*, and the evidence showed that of the five nearest sapindas then living, one was the father of the adopted boy, two others actually participated in the adoption, while the other two were at that time in their houses in the same village and did not raise any objections to the adoption. In a suit by a reversioner challenging the adoption, *held*, (1) the power to adopt given by *S* did not *ipso facto* come to an end with his death, and as the evidence showed that there had been no change in the circumstances at the time the adoption was made and that the then nearest sapindas did not object to the adoption, the adoption was quite valid; and (2) the adoption cannot be challenged as one not made to the last male holder *S*, because the adopted son clearly took as devisee under the deed and no question of divesting of an estate could arise. Case-law discussed.

Second Appeal against the decree of the Court of the Subordinate Judge of Kistna at Ellore in A. S. No. 460 of 1921, preferred against the decree of the Court of the Additional District Munsif of Narsapur in O.S.No.14 of 1919.

P. R. Ganapathi Aiyar and *K. Venkatarama Raju* for appellant.

S. Varadachari and *P. Bapiraju* for respondents.

The Court delivered the following

JUDGMENTS :—*Odgers, J.* :—This was a suit by a reversioner during the life-time of a widow for a declaration that an adoption alleged to have been made by the latter is not valid and binding on the reversioners. The District Munsif held that the objection raised by the plaintiff to the validity of the adoption failed, which view was upheld by the Subordinate Judge. A certain person called Somanna executed on the 26th April, 1891 Ex. I which is a document in favour of one Danalakshmi, his daughter-in-law, whereby he gave her certain property—the effect of which will be discussed later—and a power or consent to her to adopt. The words are: Odgers J.

"As you asked me for my consent in order to adopt a boy for the prospering of our family, I have given my consent, so that you may adopt at your pleasure, whomsoever you may like, whenever it is necessary, from among the sons of your brother, or the sons of my brothers, or their daughters' sons or their sons' sons."

Somanna died on the 28th August, 1891 without having revoked this authority and, on the 10th June, 1910 or nearly

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19 years after, the adoption in question was made by Dhanalakshmi.

The first point taken by Mr. P.R. Ganapathi Aiyar is that, as the father-in-law is merely a sapinda, his consent must come to an end with his death. It is only, says the learned vakil, in the case of the husband's authority that it extends beyond his death. Somanna had three brothers, Subbanna, Lingappa and Thirapayappa. The son of Lingappa called Ammanna is the plaintiff and another of his sons called Suriah is the 2nd defendant. One of the sons of Thirapayappa is Moolaya *alias* Moolaswami of whom we shall hear more and the other son is Chinna Venkataramiah. Somanna had a son Ramayya, who had predeceased him and who married Dhanalakshmi, the adoptive mother in the present case.

It is of course well settled in this Presidency since its recognition in the Ramnad case, *Collector of Madura* v. *Moottoo Ramalinga Sethupathi* (1) [see also the case in *Sri Virada Pratapa Raghunada Deo* v. *Sri Brozo Kishoro Patta Deo* (2) which approved it] that a widow may adopt if duly authorised by her husband's kindred. This has been amplified and explained in various later cases. See *Kristnayya* v. *Lakshmipathi* (3) where it is said that the adoption must be made not from capricious or corrupt motives but on a fair consideration by what may be called a family council of the expediency of substituting an heir by adoption to the deceased husband. This case has been referred to a Bench by a learned Judge of this Court on account of the opinions expressed in *Mami* v. *Subbarayar* (4) and *Suryanarayana* v. *Ramadoss* (5). Referring to *Subramanyam* v. *Venkamma* (6) which held that the principle of the decisions of the Privy Council would be satisfied if the consent of the nearest sapinda was obtained, the learned Judges in *Mami* v. *Subbarayar* (4) proceed:

"It cannot be said to have been in the contemplation of the learned Judges who held so, that the consent of the nearest sapinda would be sufficient, even if at the time of adoption that sapinda is no longer living and the person who is the nearest sapinda at the time does not consent to the adoption. It must, we think, be conceded that, if a sapinda who has given his consent withdraws it, afterwards the widow would not be entitled to act upon such consent, and it seems to us to be unreasonable to hold that a consent once given should become irrevocable by the death of the sapinda giving the consent so as to over-

1. (1868) 12 M I A 397.
2. (1876) I L R 1 M 69 (P C).
3. (1920) I L R 43 M 650: 39 M L J 70 (P C).
4. (1911) I L R 36 M 145: 24 M L J 484.
5. (1917) I L R 41 M 604: 34 M L J 87.
6. (1903) I L R 26 M 627: 13 M L J 239.

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ride the opinion of the sapinda who subsequently became entitled to be heard. But it is contended that, if the authority is acted upon within a reasonable time, that ought to be sufficient to obviate the necessity of obtaining the consent of the sapindas living at the date of adoption. No doubt it may not be necessary that the consent should be given actually at the time the adoption is made, but it seems to us that at any rate a consent previously obtained from a deceased sapinda cannot be efficacious to validate an adoption which is not approved by the persons who are the nearest sapindas at the time the adoption is actually made."

Whereas in *Suryanarayana* v. *Ramadoss* (5), a judgment of Sèshagiri Aiyar, J., the learned Judge says:

"This train of thought (*i. e.*, that the assent of the sapindas is presumptive evidence of the goodness of the act) precludes me from acceding to the proposition that mere lapse of time without more, or the death of the consenting sapinda would put an end to the authorisation freely and *bona fide* granted. It is settled that the fact that a consent to an alienation was given by a reversioner who is dead would not by itself be sufficient to enable the reversioner entitled to succeed to the property to impeach that consent. In my opinion the same reasoning should govern the assent to an adoption."

Mr. Ganapathi Aiyar insists that an adoption must be invalid if made without the consent of the nearest or near sapinda at the time; whereas, on the other hand, Mr. S. Varadachari maintains that, in the case of a consent once obtained by the widow, it is sufficient if the sapindas have the right of veto when the adoption is made a long time after the consent was originally given and if the circumstances have materially changed. On this we have no evidence here. In *Anne Brahmayya* v. *Chelasami Rattayya* (7) Ramesam, J., says:

"In my opinion there is an essential difference between the authority of the husband and the assent of a sapinda. The former is intended to be exercised only after the death of the husband. The latter is intended to be used at a reasonable time after the consent is given. When the interval is short, the death of the sapinda may not matter; but a sapinda's assent is not to be pocketted by the widow and used long after it was given when entirely different considerations as to the expediency of the adoption may apply."

Mr. Varadachari, on the other hand, lays stress on the words quoted above from *Mami* v. *Subbarayar* (4) "which is not approved by the persons who are the nearest sapindas at the time the adoption is actually made".

He says that these words import that, once a widow has the consent of a near or the nearest sapinda and does not adopt within a reasonable time, the sapindas who are nearest at the time when the adoption is actually made and when the circumstances which originally prevailed when the consent was given may no longer exist must be deemed to have the power

4. (1911) I L R 36 M 145: 24 M L J 484.
5. (1917) I L R 41 M 604: 34 M L J 87.
7. (1924) 20 L W 503 at 517.

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of veto. The case in *Suryanarayana* v. *Venkataramana* (8) which was a general power given to the widow to adopt any boy at any time and was not acted upon for 9 years was construed and explained in *Kamesam* v. *Batchamma* (9) as meaning that an authority given in such general terms cannot be relied on as validating an adoption made several years afterwards when several of the sapindas who gave the authority had died and when other sapindas interested in the estate and affairs of the widow had come into existence and *when other similar circumstances had intervened before the adoption took place.* They also refer to *Mami* v. *Subbarayar* (4). In the present case the facts are somewhat important because it is found that the reversioners of equal degree with the plaintiff Ammanna, namely Suriah and Moolaya actively participated in the adoption and the other two Venkatramaiah and Ammanna, the plaintiff, were in their houses at the time of the adoption and did not object. In this connection reliance is placed on the case reported in *Venkammal* v. *Namasivaya Chetty* (10) where it was held that there must be a conscious exercise of discretion on the part of the sapinda as to whether assent shall or shall not be given. There was no evidence or allegation that the widow asked for the boy in consequence of any authority given by her husband. But the sapinda had allowed his boy to be brought up by the widow, had been frequently urged to give the boy in formal adoption and allowed him to be so adopted. The learned Judges held that the natural father's conduct showed that he gave a deliberate assent to the action of the widow in making the adoption. That case is possibly stronger than the present. But I think the facts must be taken strongly against the plaintiff on this point.

The second point taken by Mr. P. R. Ganapathi Aiyar is that, even if this adoption had taken place and even if it must be held to have taken place with the consent of the nearest sapinda, the person to whom the adoption was made, namely, the son of Somanna, never had any estate and that the adoption was therefore not made to the last male holder who is Somanna, but to Danalakshmi's husband Ramayya. It is further said that it is a principle of the Hindu Law that, where an estate has vested in the heirs of the deceased person, it cannot be afterwards divested by any adoption made by the widow

4. (1911) I L R 36 M 145: 24 M L J 484.
8. (1903) I L R 26 M 681: 13 M L J 318.
9. (1914) M W N 620. 10. (1895) 6 M L J 35.

in pursuance of a power, the only exception being that, if a widow has succeeded by inheritance to the estate of her husband and makes an adoption, she obviously divests herself *ipso facto* of her estate in favour of the adopted son. Many cases were quoted for this proposition. It is probably not necessary to go through all of them. Reference may be had to *Annamma* v. *Mabbu* (11) where it was held that the estate of the deceased son having become vested in his heir cannot be defeated and divested by an adoption, and to *Rathna Mudaliar* v. *Raghunadha Bhattar* (12) where it is clearly laid down that an adoption not made to the last male holder which would have the effect of divesting the estate taken on inheritance by the deceased's brothers would be invalid. The answer to this is said to be, to begin with, that the rule as to the last male holder does not apply to joint families and further that there is no scope for the rule as to divesting where there is, as in this case, a document, there being no question of inheritance and the adopted son clearly takes as devisee under the document Ex. I. The rule as to divesting has been quite lately explained by Kumaraswami Sastri, J. in the Tanjore Palace case, *Maharajah of Kolhapur* v. *Sundaram Aiyar* (13) where he says :—

"The whole principle underlying the rule as to divesting estates is that a superior title as heir cannot be created by a widow, while the property has already vested in a person who in law has taken the estate from the deceased heir of the last male holder."

In *Bheema Deo* v. *Kunja Behari Deo* (14), which was referred to by the learned vakil for the respondents, a case of an impartible zemindari, it was held the power to adopt was not limited in point of time by the fact that a line of the husband's heirs had in succession come into possession of the estate. The limit to such power is when the husband's adopted son attains full age and so full capacity to continue the line by natural born sons or adoption. All the cases speak as to the divesting of an estate which has devolved *by inheritance*. In this case by this settlement, or whatever it may be called, Ex. I, the father-in-law of Dhanalakshmi purported to give her for some estate or other all his property with the exception of certain property given to his daughter under these words:—

"You are therefore hereby authorized to keep the whole of the property mentioned herein under your management throughout your lifetime and to pass

11. (1875) 8 M H C R 108. 12. (1898) 8 M L J 173.
13. (1924) I L R 48 M 1 at 214.
14. (1921) I L R 44 M 733: 41 M L J 648 (P C).

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the said property to the adopted son either after your death or at any time at your pleasure, meanwhile maintaining the adopted son at your own cost."

There can therefore in this case, it seems to me, be no question of inheritance where the mode of natural devolution has been artificially controlled by a document of this character and it is not contended that the settlor had no power to make such a disposition of his property. It has been argued at length on one side or the other that the donee took either a woman's estate or a mere life-estate. If she took a woman's estate she would have the power of course to pass the corpus of the estate in accordance with the terms of the document. If it is a life-estate solely as known to the English Law she either has a power of appointment within a certain class to the whole property after her death or the adopted son is a *persona designata* although he is to be selected from a certain class of persons. Whichever view is taken of this document, I do not think it makes any difference to the decision of the present point. If the rule of Hindu Law as to adoption to the last male holder is a corollary to the rule as to the divesting of already vested estates, it seems to me that these doctrines have no application to a case like the present, where the settlor after the transfer can clearly not be regarded as the last male holder.

I therefore think the appeal fails on both grounds and I would dismiss it with costs.

Viswanatha Sastri, J.

Viswanatha Sastri, J. :—Plaintiff is the appellant. He sued for a declaration that the adoption of the 1st defendant by the 3rd defendant was not valid and binding on the reversioners. The adoption was made on 10th June, 1910, as recited in the adoption deed Ex. II, and the deed recites that it was made in pursuance of an authority to adopt given to 3rd defendant by her deceased father-in-law on 26th April, 1891, under a deed, Ex. I. It was alleged in the plaint that the authority would not have been acted upon after the father-in-law's death; that no adoption in fact took place and that even if it took place it was not done "with the consent of the then surviving heirs". Both the Lower Courts found that the 1st defendant was adopted by the 3rd defendant; and that the authority given in Ex. I was sufficient. It was contended before us that the adoption was not valid because, (1) the authority given by the father-in-law was useless after his death; and (2) the adoption was made to 3rd defendant's husband and not to the last male holder, and at a time when the reversion had vested in others. The second appeal first

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came before me sitting as a single Judge, and as there was an apparent conflict between *Mami* v. *Subbarayar* (4) and *Suryanarayana* v. *Ramadoss* (5), I ordered that it be posted before a Bench.

In *Mami* v. *Subbarayar* (4) the adoption was made by the adoptive mother on the authority given to her by her deceased adopted son in a will left by him. The sapindas living on the date of the adoption did not give their consent; and it will appear from the judgment (at page 146) that the adoption was made in disregard of the opinion of the nearest sapindas then living. The learned Judges observe at page 148 :—

"It seems to us that a consent previously obtained from a deceased sapinda cannot be efficacious to validate an adoption which is not approved by the persons who are the nearest sapindas at the time the adoption is actually made."

This case was examined in *Suryanarayana* v. *Ramadoss* (5) and it was held that mere lapse of time without more, or the death of the consenting sapinda, will not put an end to a consent freely and *bona fide* granted. I may here state that although the adoption in the present case was made 19 years after the date of authority, it was admitted in the plaint (paragraph 6) and conceded before us that, had the donor of the authority been alive on the date of adoption, the adoption would have been perfectly valid. The question therefore is whether his death *ipso facto* put an end to his authority. In *Suryanarayana* v. *Ramadoss* (5) it was held that such would not be the case, and in *Anne Brahmayya* v. *Chelasami Rattayya* (7) Ramesam, J. observes at page 517 that—

"When the interval is short, the death of the sapinda may not matter; but a sapinda's assent is not to be pocketted by the widow and used long after it was given, when entirely different considerations as to the expediency of the adoption may apply."

In *Suryanarayana* v. *Venkataramana* (8) the question arose whether the assent of sapindas to adopt "any boy at any time" would entitle a widow to adopt nine years after the date the consent was given; and it was held that the assent was not valid, (1) because it was too general in its nature, and (2) because during the nine years circumstances had materially changed, one of them being that two out of the three assenting sapindas and two dissenting sapindas had died. This dictum has been explained in *Kamesam* v. *Bat-*

4. (1911) I L R 36 M 145: 24 M L J 484.
5. (1917) I L R 41 M 604: 34 M L J 87.
7. (1924) 20 L W 503.
8. (1903) I L R 26 M 681: 13 M L J 318.

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chamma (9). I may here state that the authority in the present case was not to adopt any boy, but to adopt a boy "from among the sons of your brother, or the sons of my brothers, or their daughters' sons or their sons"; and that the boy adopted satisfied this description. There was no doubt the liberty to adopt "whenever it was necessary". In my opinion the trend of these decisions is that when the consent is given by the father-in-law who happens to be the nearest sapinda then living, his death before the adoption is made would not *ipso facto* revoke the consent; and that such consent will come to an end only if circumstances had materially changed after his death. In the present case it was not alleged that there has been any change in the circumstances on the date the adoption was made, caused either by the coming into existence of other nearer sapindas, or by the death of sapindas then alive, or by reason of the estate having vested in third persons. The evidence shows that five sapindas were alive on the date of the adoption. The boy adopted is the son of one of them and his natural father was present at the adoption. Another sapinda assisted the widow during the ceremony, and a third was present. Plaintiff and the fifth sapinda were on that date in their houses in the village, and did not in any way indicate to the widow that they objected to the adoption. Soon after the adoption, steps were taken to transfer the patta in the name of the adopted boy and notices were sent to the plaintiff. From what the District Munsif says in paragraph 49, the plaintiff made no serious attempt to oppose the transfer, and Venkataramiah alleged that his son had been adopted and not the first defendant. And what is more the suit was instituted on the last day of limitation although plaintiff was aware of the adoption at any rate when he got the notices from the Tahsildar.

It was said that the 3rd defendant had to seek out plaintiff and Venkataramiah and obtain their consent and that she did not do so. She was not adopting under any consent given by sapindas then alive; and she preferred to adopt under an authority given to her by her deceased father-in-law. This authority had the approval of three out of five sapindas alive on the date of the adoption; and in the case in *Mami* v. *Subbarayar* (4), the consent was held not to "be efficacious to validate an adoption which is not *approved* by the persons who are the nearest sapindas at the time the adoption is actually

4. (1911) I L R 36 M 145: 24 M L J 484.
9. (1914) M W N 620 at 621.

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made" (see at p. 148). That presence at an adoption ceremony would imply acquiescence, though such acquiescence may not be equivalent to consent, is the view taken in *Ramchandra* v. *Mulji Nanabhai* (15). In the present case all that was needed was acquiescence in a consent already given, and not fresh consent.

I therefore come to the conclusion that in the circumstances of the present case the authority under which the 3rd defendant acted was not at an end on the date the adoption was made.

It was next contended by appellant's vakil that the adoption was invalid because it was not made to the last male holder, who in this case was said to be the father-in-law. The father-in-law had given the properties to the 3rd defendant under Ex. I, and possession was delivered over to her on the date of the deed (26th April, 1891). The deed goes on to say :—

> "You are therefore hereby authorized to keep the whole of the property mentioned herein under your management through your lifetime, and to pass the said property to the adopted son either after your death or at any time at your pleasure."

And it concludes by saying—

> "You shall enjoy the said lands at your pleasure, yourself paying the Government taxes thereon."

I fail to see how after this transfer the father-in-law could be deemed to be the last male holder. The terms of Ex. I above stated appear to me to be similar to the terms of the will which was construed in *Srinivasa* v. *Dandayudapani* (16). The adopted son (1st defendant) would not succeed by inheritance but only as devisee under Ex. I ; and the rule that the adoption will be invalid unless made to the last male holder applies only to cases where the adopted son would take by inheritance. See *Venkatarama Aiyar* v. *Gopalan* (17). As observed by Kumaraswami Sastri, J. in *Maharaja of Kolhapur* v. *Sundaram Aiyar* (13)—

> "The whole principle underlying the rule as to divesting estates is that a superior title as heir cannot be created by a widow, while the property has already vested in a person who in law has taken the estate from the deceased heir of the last male holder."

In this view it is not necessary to consider the cases relied upon by appellant's vakil [*Chandra* v. *Gojarabhai* (18), *Shri*

13. (1924) I L R 48 M 1 at 214. 15. (1896) I L R 22 B 558 (F B).
16. (1889) I L R 12 M 411. 17. (1918) 35 M L J 698.
18. (1890) I L R 14 B 463.

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Dharnidhar v. *Chinto* (19), *Lakshmibhai* v. *Vishnu Vasudev* (20) and *Dattatraya Bhimrao* v. *Gangabhai* (21) as in all of them the adoption was after the estate had vested by inheritance in a third person.

I would therefore dismiss the second appeal with costs.

T. S. V. *Appeal dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE WALLACE.

Ramanathan Chettiar through his Agent Harihara Aiyar ... *Appellant*—Petitioner (Decree-holder)*

v.

Karuppayya Nadar ... *Respondent (Counter-petitioner —Attaching creditor)*

Ramanathan Chettiar v. Karuppayya Nadar.

Civil Procedure Code, S. 47—Applicability—Rival decree-holders—Question between—Execution application by B *in suit of* A*—Judgment-debtor in two suits same—Maintainability—No execution application by* B *in his own suit—Effect—Notice to judgment-debtor of* B's *application in* A's *suit—Necessity—Money paid in Court to credit of* A's *suit*—B's *remedy for payment of his decree amount out of—Money paid as security for satisfaction of decree pending application by judgment-debtor to enter up satisfaction of decree—Disposal of application in favour of judgment-debtor—Effect on security—Reversal of order on appeal—Money still in Court deposit—Security on it if revived.*

The question whether money in deposit in Court to the credit of *A's* suit against *B* should be paid out to *C*, another decree-holder of *B*, does not come under S. 47, Civil Procedure Code. No appeal lies under that section against an order deciding that question.

A sum of money was in deposit in Court to the credit of *A's* suit against *B*. *C*, another creditor of *B*, attached *before* judgment that sum of money, and subsequently obtained a decree. Without filing an execution application in his own suit, *C* applied by an execution application in *A's* suit to the executing Court to pay out that sum of money to him in execution of his own decree.

Held, that *C* had no *locus standi* to make the application, and that notice of the application to *B* was in any event necessary.

Proper procedure to be adopted by *C* in such a case.

Where money is deposited in Court to the credit of a suit as security for the decree therein pending an application by the judgment-debtor that the decree was otherwise satisfied, an order on the said application in favour of the judgment-debtor has not the effect of destroying for ever the lien the decree-holder has upon the money. Where the Appellate Court reverses the order in favour of the judgment-debtor, and the security money is still in the custody of the executing Court, *semble*, that money resumes again the character which it had when it was paid in, *viz.*, security for the satisfaction of the decree.

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*A A A O No. 104 of 1924 23rd April, 1926.

19. (1895) I L R 20 B 250. 20. (1905) I L R 29 B 410.

21. (1921) I L R 46 B 541.

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Appeal against the appellate order of the Court of the Subordinate Judge of Dindigul, dated 8th July, 1924, in A. S. No. 51 of 1925 preferred against the order of the Court of the District Munsif of Periyakulam in E. A. No. 972 of 1922 in O. S. No. 960 of 1920, dated 3rd March, 1923.

K. S. Ramabhadra Aiyar for appellant.

K. Rajah Aiyar for respondent.

The Court delivered the following

JUDGMENT :—This appeal is against the order of the Subordinate Judge of Dindigul in the following circumstances:

The appellant had in execution of a decree attached certain moveables belonging to his judgment-debtor (2nd defendant) in his suit O. S. No. 960 of 1920. The 2nd defendant in order to recover the moveables deposited in the executing Court Rs. 80 on 22nd November, 1921, and again Rs. 120 three days later, and the money remained in Court to the credit of the appellant's suit. An application by the judgment-debtor that the decree was otherwise satisfied was pending. This application ended in favour of the judgment-debtor on 26th January, 1922. The appellant appealed against that order but failed to obtain a stay of further proceedings pending the decision of the appeal. On 11th November, 1922, the appeal ended in appellant's favour and the application was remanded for further enquiry as to whether the decree was really satisfied.

The respondent holds a decree against the 2nd defendant in O.S.No.272 of 1922. On 13th February, 1922, he obtained an attachment *before* judgment of the moneys of the 2nd defendant which were in Court to the credit of the appellant's suit. The respondent got his decree on 15th March, 1922. On 12th June, 1922, he applied by an execution application in the appellant's suit to the executing Court to pay out these moneys to him in execution of his decree. This was opposed by the appellant; and the execution Court dismissed the application. The respondent appealed and succeeded in the Lower Appellate Court and appellant has now come up here.

The appellant has raised two preliminary points of jurisdiction. One is that no appeal lay to the Lower Appellate Court at all, as the order of the executing Court does not come under S. 47. The other point is that the respondent had no *locus standi* to apply at all, as he has not put in any execu-

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tion petition in his own suit. The third question for decision is on the merits, viz., whether the decision of the executing Court that the appellant's decree was fully satisfied availed to put the money standing to the credit of the appellant's suit at the disposal of the respondent for the satisfaction of his decree.

As to the first point, it seems to me valid, although it has been taken only for the first time in this Court. It is obvious that the contest is not between a decree-holder and his judgment-debtor but between rival decree-holders. It is argued that the respondent must be taken to be the representative of the judgment-debtor for the purposes of this sum at issue; but I cannot see how that can be. As noted above the respondent has not put in any execution petition nor did he even make the judgment-debtor a party to his execution application in the appellant's suit. He could not in any circumstances claim to be representing the judgment-debtor's interests in this matter unless the judgment-debtor admits that he is still the judgment-debtor of the respondent, *i. e.*, that the respondent's decree is not satisfied. But, of that I know nothing, since the respondent has not chosen to make the judgment-debtor a party. Obviously if the judgment-debtor has otherwise satisfied the respondent's decree, then the respondent's claim is adverse to the judgment-debtor's claim and the respondent cannot be his representative. It is impossible therefore on the materials before me to hold that the respondent is in any sense the representative of the judgment-debtor. The matter clearly is not one relating to the execution, discharge or satisfaction of the appellant's decree as between himself and his judgment-debtor, and the respondent is in no sense bound by the appellant's decree. The finding of the executing Court is that the money was the money of the judgment-debtor. The order that, as between appellant and respondent, money should be paid out to the respondent does not appear to me in any sense to be an order under S. 47.

The case in *Kuppuswami Aiyar* v. *Kuppuswami Aiyar* (1) relied on by the respondent does not help, because the decision in that case depended on the wording of O.21, R. 53(3) which declares that an attaching decree-holder shall be the representative of the holder of the attached decree The present case is not a case of an attaching decree-holder at all. A decision more to the point, though not exactly on it, is

1. (1918) 9 L W 32.

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Varada Ramaswami v. *Vumma Venkataratnam* (2) where it was held that a contest between rival decree-holders for rateable distribution does not come under S. 47. It appears to me therefore that no appeal lay to the Subordinate Judge and that his order is without jurisdiction and void.

As to the second point it is difficult to see how the application was maintainable at all. The respondent had not applied for execution of his decree and no execution petition by him was pending. He had no *locus standi* in the appellant's suit, and no right to put in any execution application in that suit. His proper course was to have put in an execution petition in his own suit, asking for the transfer to his suit of the amount at the credit of the appellant's suit, and then for the payment of this amount to him. In *Nachiappa Chettiar* v. *Subbier* (3) this Court has discussed generally the proper procedure in cases of several attachments before judgment which is necessary to make the judgment-debtor's money lying in Court available for payment out to successful decree-holders. Apart from this, it was essential that the respondent should have given notice to the judgment-debtor. It is not a case where notice could be dispensed with, because execution was being taken out within one year of the decree—because as pointed out, the respondent did not take out any execution petition at all. He was evidently endeavouring to get hold of the money without the knowledge of the judgment-debtor.

As to the third point, it is not necessary to go into it fully. The decision on it rests on the manner in which I interpret the nature of the "security," for which purpose the money was deposited into the executing Court. I think it was clearly security for the satisfaction of the appellant's decree. If the judgment-debtor's petition to record satisfaction had failed before the District Munsif, there can be no doubt that the appellant would have the first claim on the money deposited as security for his decree. [See *Ramiah Aiyar* v. *Gopalier* (4)]. But, as it happened, the District Munsif held that the decree for which the money was security had been satisfied otherwise, and the respondent's contention is that this order had the effect of destroying for ever any lien the appellant had on the money. Whether, if the respondent's application for the money had been in proper form and had been disposed of by the executing Court after it had declared that the appellant's

2. (1922) 42 M L J 473. 3. (1923) I L R 46 M 506 : 44 M L J 418 (F B).
4. (1918) I L R 41 M 1053 : 35 M L J 355.

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decree was fully satisfied and before the Lower Appellate Court reversed that order, the executing Court would have been justified in paying out the money to the respondent need not be decided here. But I should be inclined to hold, if necessary, that when the Lower Appellate Court reversed the order of the executing Court, and the security money was still in the custody of the executing Court, that money resumed again the character which it had when it was paid in, viz., security for the satisfaction of the appellant's decree, and that it bore that character when the respondent's application for payment to him was disposed of by the executing Court ; that is, that on 3rd March, 1923 when that order was passed the security had again resumed its original character and was at the credit of the appellant's suit for the satisfaction of his decree. As a matter of fact, after the remand the executing Court held on 14th April, 1923 that the appellant's decree was not satisfied and that order has not been appealed against and is final. However, in view of my findings on the preliminary point raised it is unnecessary to go further into this question.

I must therefore hold that the order of the Lower Appellate Court was without jurisdiction. I reverse it and restore the order of the District Munsif with costs here and in the Lower Appellate Court.

A. S. V. *Appeal reversed and the order of District Munsif restored.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE PHILLIPS AND MR. JUSTICE MADHAVAN NAIR.

Katragadda Ramayya and another ...*Appellants** (*Defts.*)

v.

Katragadda Bapayya ... *Respondent* (*Plaintiff*).

Ramayya v. Bapayya.

Civil Procedure Code, Sch. II, para. 17 (1) *and* (4)—*Application to file agreement of reference in Court—Order on, inconsistent with agreement—Validity—Reference to three arbitrators—Order that opinion of majority should prevail—Validity—Application to file in Court by one of parties only—Effect.*

One of the parties, who referred their disputes to the arbitration of three named arbitrators, applied to the Court under paragraph 17 (1) of Sch. II to Civil Procedure Code to have the agreement filed in Court. This was done and under para. (4) an order of reference was made, but the Court added a further direction that in case of disagreement among the arbitrators the opinion of the majority should prevail.

Held, that the order was inconsistent with the agreement to refer to arbitration, and was therefore illegal.

*A A O No. 294 of 1925. 10th March, 1926.

Quaere: Whether the order would have been legal if all the parties had agreed to file the reference in Court. Ramayya v. Bapayya.

When a reference is made to two or more arbitrators the award is not valid unless it is concurred in by them all.

A reference to three arbitrators implies an agreement to be bound by the decision of all the three and not merely of a majority.

Appeal against the order of the Court of the Subordinate Judge of Bapatla, dated 27th July, 1925 in O.S. No. 92 of 1923.

Ch. Raghava Rao for appellants.

B. Somayya and *P. Bapiraju* for respondent.

The judgment of the Court was delivered by

Phillips, J. :—The parties in this case referred their disputes to the arbitration of three named arbitrators. One of them, the plaintiff, then applied to the Court under para. 17 (1) of Sch. II to the Civil Procedure Code to have the agreement filed in Court. This has been done and under para. 4 an order of reference has been made, but the Court has added a further direction that in case of disagreement among the arbitrators the opinion of the majority should prevail. The appellants contend that such an order is illegal because it is inconsistent with the agreement to refer to arbitration. It is well settled that when a reference is made to two or more arbitrators the award is not valid unless it is concurred in by them all. This was laid down in *United Kingdom Mutual Steamship Assurance Association* v. *Houston and Co.* (1) and was assumed in *Cameron* v. *Cuddy* (2). It is also laid down in *Baboo Surubjeet Narain Singh* v. *Baboo Gouree Pershad Narain Singh* (3), *In the matter of Junglee Ram* v. *Ram Heet Sahoy* (4), and *Nem Roy* v. *Bharut Roy and others* (5). It is true that in these cases one or more of the arbitrators did not sign the award and on that ground it was held not to be valid, but the reason given for such a conclusion is that all the arbitrators had not concurred in the award. *Prima facie*, therefore, the order of the Subordinate Judge would appear to be inconsistent with the reference to three named arbitrators. It is, however, contended for the respondent on the authority of *Bala Pattabhirama Chetti* v. *Seetharama Chetti* (6) that this order is good. That was a case in which the agreement

1. (1896) 1 Q B 567.
2. (1914) A C 651.
3. (1867) 7 W R 269.
4. (1873) 19 W R 47.
5. (1874) 22 W R 129.
6. (1894) I L R 17 M 498.

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Phillips, J.

was filed in Court and one of the arbitrators refused to act. The District Judge appointed another arbitrator under the provisions of paragraph 5 of Sch. II and it was held that this order was valid. It was argued that under para. 19 all the provisions of Sch. II are made applicable to proceedings on reference out of Court which is afterwards filed in Court and that consequently when such a reference is filed in Court the parties must be deemed to submit to all the rules and procedure prescribed in the second schedule. It was there held that the words in paragraph 19 "so far as they are consistent with any agreement filed" do not mean that the agreement must contain in every case an express provision as to what ought to be done if any arbitrator is unwilling to act and that the reasonable construction is that the action of the Judge should not be inconsistent with the agreement if it contains any special provision on the subject. The argument in support of this was that the order of reference made in a suit pending should not prove abortive but result in an award according to the original intention of the parties and it was consequently held that the provisions of the Civil Procedure Code relating to arbitration must be taken to be intended by the parties to the agreement to apply and that this order was not inconsistent with the terms of the agreement. Whether that decision is correct on the facts it is not necessary to express any opinion, for the question must be decided in this case on whether the order appealed against is inconsistent with the agreement of the parties. If it is understood, as it must be, that a reference to three arbitrators implies an agreement to be bound by the decision of all the three and not merely of a majority, then this order is inconsistent with the agreement. If all the parties had agreed to file the reference in Court, it can possibly be argued that they did so with full knowledge of the provisions of the Code and with the intention that these provisions should be applied to their arbitration. When, however, only one of the parties applies and drags the others to Court, no such presumption can be drawn, and when an order is made inconsistent with the original agreement, such an order is not valid. In the present case the defendants agreed to abide by the concurrent award of three persons and consequently there can be no presumption of an agreement to abide by the opinion of a mere majority. This order, therefore, directing that the opinion of the majority shall prevail appears to be inconsistent with the original agreement and

consequently the provisions of paragraph 4 under which the order has been made cannot be applied in the present case.

Ramayya v. Bapayya.

Phillips, J.

The appeal is therefore allowed and the order that the opinion of the majority shall prevail must be struck out of the order of reference. The respondent will pay the appellants' costs of this appeal.

A. S. V. *Appeal allowed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE MADHAVAN NAIR.

P. R. M. Muhammad Abdul Kadir Sahib Marakkayar ... *Appellant* (Assignee Decree-holder)*

v.

Syed Abdul Kadir Marakkayar ... *Respondent (5th defendant).*

Muhammad Abdul Kadir Sahib v Syed Abdul Kadir.

Civil Procedure Code, O. 21, R. 16, Proviso 2—Applicability—Conditions—Principle underlying rule in the proviso—Transfer of personal decrees brought about by death—Applicability of the proviso to.

A joint decree for a sum of money was passed against defendants 1, 5 and 6 personally and the assets of one *H* in the hands of defendants 2 to 4. A few months after, that decree was transferred to the appellant. On 8th September, 1919, the appellant applied to the Court to recognise the transfer and to execute the decree. On 16th December, 1921, the 1st defendant died, and thereupon the appellant became one of the heirs of the 1st defendant and in that capacity one of the judgment-debtors. The 5th defendant against whom the decree was sought to be executed objected to the execution on the ground that, inasmuch as the assignee decree-holder himself became one of the judgment-debtors as the legal representative of the 1st defendant, the decree ceased to be executable under O 21, R. 16 (3), Civil Procedure Code.

Held that, under O. 21, R. 16, Proviso 2, the decree ceased to be executable.

Transfer of personal decrees brought about by death is not excluded from the operation of Proviso 2.

Appeal against the decree, dated 8th October, 1923, of the Court of the District Judge of Ramnad at Madura in A. S. No. 190 of 1922 preferred against the order of the District Munsif of Paramakudi in E. P. No. 110 of 1922 in O. S. No. 134 of 1918.

S. R. Muthuswami Aiyar for appellant.

P. N. Appuswami Aiyar for respondent.

The Court delivered the following

JUDGMENT :—This is an appeal against an appeliate order in a matter relating to the execution of a

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*A A A O No. 46 of 1924. 31st March, 1926.

Muhammad Abdul Kadir Sahib *v.* Syed Abdul Kadir.

decree for Rs. 1069-4-0 with interest. In O. S. No. 134 of 1918 on the file of the District Munsif's Court of Paramakudi the plaintiff obtained for the said amount a joint decree against defendants 1, 5 and 6 personally and the assets of one Hamid in the hands of defendants 2 to 4. The decree is dated 13th February, 1919. On the 24th August, 1919, it was transferred to the appellant and he applied to the Court on 8th September, 1919, to recognise the transfer and to execute the decree. On 16th December, 1921, the 1st defendant—a Muhammadan—died. His daughter also died, and, on her death, the assignee decree-holder, as her husband, became one of the heirs of the deceased 1st defendant and in that capacity one of the judgment-debtors. The 5th defendant against whom the decree was sought to be executed objected to the execution mainly on the ground that the decree has ceased to be executable under O. 21, R. 16, cl. (3) inasmuch as the assignee decree-holder himself became one of the judgment-debtors as the legal representative of the 1st defendant. This objection was overruled by the District Munsif but was allowed by the District Judge. The transferee decree-holder has filed this appeal against the order of the District Judge dismissing his application.

Order 21, R. 16 after providing that when a decree has been transferred by assignment in writing or by operation of law, it may be executed by the assignee, lays down in proviso 2, that—

> "Where a decree for the payment of money against two or more persons has been transferred to one of them it shall not be executed against the others."

The learned vakil for the appellant argues that the proviso does not apply to the present case for two reasons : (1) because, while the proviso contemplates a transfer of the decree (by the assignment or by operation of law) to one of several judgment-debtors, in the present case there has been no such transfer to a judgment-debtor, inasmuch as the judgment-debtor died two years after the transfer, and (2) because, while the proviso as illustrated by several decisions contemplates the transfer of a decree for the payment of money *personally* (personal decree) against two or more persons jointly, in this case there has been no such transfer of a personal decree inasmuch as there is no personal decree against the transferee decree-holder as he is in law liable only for the assets of the 1st defendant in his hands.

Muhammad Abdul Kadir Sahib v. Syed Abdul Kadir.

In my opinion both these arguments are unsubstantial as they ignore the principle underlying the rule. No authorities have been cited in support of them. "When on account of death a creditor becomes heir to a debtor" (as here) or "a debtor becomes heir to a creditor and thus the two opposite characters of 'debtor and creditor' become united in the same person, the obligation to pay money may be regarded as extinguished." [See *Banarsi Das* v. *Maharani Kuar* (1)]. This principle which, as Mahmud, J. points out, owes its origin to the *confusio* of the Roman Law, has been applied by proviso 2 of O. 21, R. 16 to the case of joint judgment-debtors, when a decree for the payment of money has been transferred to one of them. In *Degumbree Dabee* v. *Eshan Chunder* (2) it was held that one of several judgment-debtors who satisfied the judgment-debt by taking an assignment thereof could not enforce it by execution against his co-debtors and that his only remedy against them was by a regular suit for contribution. This rule has been adopted by the Legislature in proviso 2 of O. 21, R. 16. "The principle upon which this rule is based seems to be that when one of the persons jointly liable under a decree takes in himself the character of creditor and judgment-debtor in respect of the whole decretal debt, the effect is to extinguish the liability of all the co-judgment-debtors under the decree." [*Banarsi Das* v. *Maharani Kuar* (1)]. It is clear that the assignee decree-holder and the 5th judgment-debtor are joint judgment-debtors and one of them at the same time is also a decree-holder. In a case like the present where the transfer of the decree happens by death of the judgment-debtor, the two characters of 'debtor and creditor' can become united only in the persons of the legal representative of the judgment-debtor; and when such 'union' takes place the 'proviso' would apply. Thus, there is no meaning in saying that the decree has not been transferred to the judgment-debtor. O. 21, R. 16, proviso 2, therefore clearly prohibits the present appellant from executing his decree against his co-judgment-debtor, the 5th defendant-respondent. The decision in *Lalla Bhagun Pershad* v. *Holloway* (3) does not support the appellant as in that case there was no joint personal decree against the judgment-debtors. Referring to the facts the learned Judges state: "It [S. 232, proviso (*b*).] does not apply to such a case as the present, in which nothing was due from the assignee

1. (1882) I L R 5 A 27 at 34. 2. (1868) 9 W R 230.
3. (1885) I L R 11 C 393.

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of the decree personally, he having been made a defendant only by reason that he had become the owner of the property mortgaged under the bond and subject to the mortgage." (*See* p. 396.)

The second argument is also equally devoid of any substance. Decisions have laid down that the expression "a decree for the payment of money against several persons in proviso 2 of O.21, R. 16 signifies a personal decree against two or more persons jointly." [See *Laldhari Singh* v. *Manager, Bharatpura Estate* (4) and *Panachand* v. *Sundarabai* (5)]. It is not disputed that there was such a decree in this case against the predecessor-in-interest of the assignee decree-holder (*i. e.*, the 1st defendant judgment-debtor) and other defendants and this personal decree has been by operation of law transferred to the appellant who is the legal representative of the judgment-debtor, in effect the judgment-debtor himself. This is all what is required to make the 'proviso' applicable and in consequence to render the decree inexecutable. If I give effect to the arguments of the learned vakil for the appellant, it would mean that I should exclude from the operation of the proviso transfer of personal decrees brought about by the death. The principle underlying the rule does not contemplate this restriction in its application.

This Civil Miscellaneous Second Appeal is dismissed with costs.

A. S. V. *Appeal dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE SPENCER AND MR. JUSTICE RAMESAM.

The Secretary of State for India in Council represented by the Collector of Kistna ... *Appellant** (*Defendant*)

v.

Garapati Somayya ... *Respondent* (*Plaintiff*).

The Secretary of State for India v. Somayya.

Madras Motor Vehicles Rules—Licence issued under—Improper cancellation by District Magistrate of—Damages for—Suit against Government for—Maintainability—Costs of suit—Dismissal of suit on the ground that defendant is not party liable—Defendant's right to costs of suit.

The District Magistrate, both in issuing a licence under the Madras Motor Vehicles Rules and in cancelling it, acts in pursuance of a statutory authority vested in him. The Government is not responsible for the act of the District Magistrate in cancelling a permit, assuming that he acted in error in so doing.

*Appeal No. 102 of 1925. 30th April, 1926.

4. (1911) 12 I C 70. 5. (1907) I L R 31 B 308.

The Secretary of State for India v. Somayya.

Held, therefore, that the Secretary of State for India was not liable for damages for the improper cancellation of a licence by the District Magistrate.

When the plaintiff institutes a suit against a party who shows that he is in no way liable to be sued, and the suit fails, the defendant should get his costs. The fact that the plaintiff has been put to an immense loss for no fault of his is no ground for disallowing to the successful defendant his costs of the suit, when he is not the person who is in law liable for the loss.

Per Ramesam, J.:—Observations on the indefiniteness of the rules in the Madras Motor Vehicles Rules relating to the inspection of vehicles.

Appeal against the decree of the Court of the Subordinate Judge of Kistna at Ellore in O. S. No. 91 of 1921.

The Government Pleader for appellant.

K. Kameswara Rao for respondent.

The Court delivered the following

Spencer, J.

JUDGMENTS :—*Spencer, J.* :—The plaintiff in this suit was the owner of two motor buses called "The Republic" and "The Albion" which plied between Ellore and Chintalapudi. He instituted this suit against the Secretary of State for India represented by the Collector of Kistna for unliquidated damages caused to him by the improper cancellation of his licence. Under the Madras Motor Vehicles Rules, which have the force of law, the District Magistrate is vested by R. 30 with the power of issuing permits in Form G for motor vehicles which are intended to be let or plied for hire outside the City of Madras. One of the conditions in Form G is that the owner of the vehicle, if it be a motor bus, shall arrange for its examination once in every six months by a person approved by the District Magistrate. It appears that the District Magistrate cancelled the licence for the bus "The Republic" because it was not examined by the District Board Engineer as required by the permit. It was found by the Judge in the Lower Court that the District Board Engineer was a little negligent in not inspecting the car when it was produced for inspection. Assuming, however, that the District Magistrate committed an error of judgment in cancelling the licence and that the blame for the bus not being examined as required by the conditions of the permit lay more with the Engineer than with the plaintiff, the question for our decision is whether the Government is on that account liable for damages. The District Magistrate, both in issuing the licence and in cancelling it, was acting in pursuance of a statutory authority vested in him. In such a case it was held in *Shivabhajan* v. *Secretary of State for India* (1), and *Ross* v. *Secretary of State for India* (2), that

1. (1904) I L R 28 B 314. 2. (1915) I L R 39 M 781 : 29 M L J 280.

The Secretary of State for India v. Somayya.

Spencer, J.

the Government was not liable for the conduct of its servants. Sadasiva Aiyar, J., in the latter decision, pointed out that the Crown could not be made liable for the action of a Government servant purporting to act under a statutory power conferred upon him, because his action when he purports to exercise a statutory power is not as agent of the Crown and he quotes the leading case of *Tobin* v. *The Queen* (3). In *Shivabhajan* v. *Secretary of State for India* (1) a chief constable seized goods in pursuance of a statutory power vested in him under S. 550 of the Criminal Procedure Code. The goods being perishable were not forthcoming when the plaintiff demanded them. The learned Judges referred to the liability under Statute 21 and 22 Vict., c. 106 which now are represented by the Government of India Act, S. 32. In that case, as in the present case, it could not be contended that the act of the chief constable was in any sense productive of benefit to the revenues of the Government, nor was it a transaction out of which profit could be derived, and the Government had not ratified or adopted the act. In the present case the Government derived no profit by the cancellation of the licence. This case does not resemble the case in *Wasappa* v. *Secretary of State for India* (4), where the Government retained the proceeds of the sale of property which rightfully belonged to the plaintiff. Nor is it like the case in *Mothi Rungaya Chetti* v. *Secretary of State for India in Council* (5), where the Post Office were held liable as carriers of value payable parcels when they delivered a parcel without obtaining payment from the consignee and remitting the value to the sender. *Vijaya Ragava* v. *Secretary of State for India* (6) was an instance where the Government removed a Municipal Commissioner for misconduct. The act which the Judges treated as a tort was an act of the Government itself and not of one of its servants. The soundness of the decision has been doubted. *Kailash Chandra Nag* v. *Secretary of State for India* (7) was a case where the plaintiff sued to recover money illegally collected by a Deputy Collector when the Act only authorised the District Magistrate to apportion the tax due on account of a punitive police force. That was an instance where the Government servant concerned was not acting in pursuance of a statutory authority. I am therefore of

1. (1904) I L R 28 B 314.
3. (1864) 33 L J C P 199 at 210.
4. (1915) I L R 40 B 200.
5. (1904) I L R 28 M 213: 15 M L J 226.
6. (1884) I L R 7 M 466 (F B).
7. (1912) I L R 40 C 452.

The Secretary of State for India v. Somayya.

Spencer, J.

opinion that the learned Subordinate Judge was right in holding that the Government was not responsible for the act of the District Magistrate in cancelling the permit, assuming that the District Magistrate acted in error in so doing. That concludes the case as regards the bus "The Republic".

The permit for the bus "The Albion" appears to have never been issued to the plaintiff though it was signed by the District Magistrate, and the failure to issue it was due to the plaintiff's delay in producing the registration certificate which he was required to have under R. 2 of his licence, which declares that "No motor vehicle shall be used or allowed to be used in a public place unless it has been registered in accordance with these rules or any other rules under the Act having application to the Madras Presidency." The result is that the Memorandum of Objection fails and is dismissed with costs.

The Government have preferred an appeal on the question of costs in the Lower Court which were disallowed. The ground that appears in the Subordinate Judge's judgment for disallowing the costs is that the plaintiff had sunk a large amount of capital in motor bus service and was put to an immense loss for no fault of his. This reason for disallowing costs would be a good one if the suit had been instituted against the right defendant. When the plaintiff institutes a suit against a party who shows that he is in no way liable to be sued and the suit fails, the defendant should get his costs. The appeal must therefore be allowed and the suit dismissed with costs and in the Lower Court.

Ramesam, J.

Ramesam, J. :—I agree, but I wish to add a few words. I do not think that the cancellation of the permit in the case of "The Republic" by the District Magistrate on account of a breach of the conditions in the permit can be described either as a breach of contract or a tort. The District Magistrate being an officer on whom the duty of issuing permits was imposed by statutory rules, the case of a contract, such as *Mothi Rungaya Chetti* v. *Secretary of State for India* (5), in which the post office undertakes to carry insured parcels or the case relating to a tort, cannot therefore apply. Nor is this a case where the Government has received money belonging to the plaintiff wrongfully collected as in *Kailash Chandra Nag* v. *Secretary of State for India* (7). I think therefore the suit is rightly dismissed as against the Secretary of State for India.

5. (1904) I L R 28 M 213: 15 M L J 226.
7. (1912) I L R 40 C 452.

The Secretary of State for India v. Somayya.
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Ramesam, J.

On the merits, I wish to make one observation. So far as "The Albion" was concerned no permit was issued to the plaintiff. What was done was only the passing of a conditional order for the issue of a permit and the plaintiff must thank himself for not producing the registration certificate which ended in the cancellation. As to "The Republic" it appears that the District Board Engineer wrote to the plaintiff saying that he would go to Ellore on the 7th of July and asking him to keep the car ready for inspection. The plaintiff had the car ready for inspection, but the Engineer did not go there. Afterwards the plaintiff sent letters to the District Magistrate on the 22nd and the 23rd of August and a telegram on the 20th of September. This is alleged in para. 7 of the plaint, and this fact is not denied in the written statement. It may be that the plaintiff thought that the District Board Engineer was a subordinate of the District Magistrate. We know that the District Board Engineer is a subordinate only of the President, District Board, and not of the District Magistrate though the same individual may fill both offices. But the plaintiff seems to have thought that it is the business of the District Magistrate to have the car inspected through the Engineer who was his subordinate. In doing so, no doubt he fell into a mistake. Still it looks as if the plaintiff, who was ready to have his car inspected, could get nobody to inspect it and therefore the permit was cancelled. It may be that the District Magistrate is technically right in cancelling the permit because no certificate was produced. The District Board Engineer in his examination says that it was not obligatory on him to inspect the car, though he also adds that he never declined. As the facts of this case are somewhat obscure and at any rate; it does not appear that reminders were sent to the District Board Engineer, I do not want to make it appear that my further remarks apply to this case.

I think it is desirable to make the rules clear that there is some officer who is bound to inspect the car. The rules should also be made clear whether the owner of the car should take the car to the place which is his head-quarters, or whether the officer may fix a place for the inspection, or whether the owner of the car should go in search of the officer. Unless these things are made clear, I think the vagueness of the rules will make it possible to so manœuvre the situation as to catch a man technically and deprive him of the renewal of his permit. I do not think it ought to be possible for anybody to say that

it is not obligatory on him to inspect. It is very inconvenient to have a rule which requires a man to have his car inspected by a certain person, but there is nobody found to inspect the car. I do not mean that these remarks do apply to this case. I say that the rules should not be in an indefinite form.

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Ramesam, J.

I agree with my learned brother's order both as regards the appeal and the memorandum of objections.

A. S. V. *Appeal allowed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE SPENCER AND MR. JUSTICE ODGERS.

T. K. Lakshmana Aiyar ... *Appellant* (Plaintiff)*

v.

Sankarapandiam Pillai and others ... *Respondents (Defendants 1, 3 to 21 and legal representatives of 3rd respondent).*

Lakshmana Aiyar v. Sankarapandiam Pillai.

Limitation Act (IX of 1908), Art. 134—Sub-mortgage by usufructuary mortgagee—Transfer by sub-mortgagee—Transfer whether conveys an absolute interest or only a mortgage interest is a question of intention.

One *S* executed an usufructuary mortgage to *M* in 1873 for three years. The equity of redemption was attached and sold in Court-auction in 1875 and was purchased by the predecessor-in-title of the plaintiff. In 1883 *M* created a sub-mortgage in favour of *S*-1. In 1893 *P*, the son of *S*-1, who was then dead, executed a document in favour of the defendants who were also put in possession of the property at the same time. This document was called a sub-mortgage deed. It set out the head mortgage, the sub-mortgage and the consideration therefor Rs. 1,500 and ran thus: "I had been enjoying the land in virtue of my sub-mortgage right............................I have also become entitled to the land as full owner in virtue of the statement made in a prior suit of 1892 by the sons of *S*..........I have sub-mortgaged to you the right belonging to me in the said land and received Rs 1,500." Before registration this document was corrected by saying that the description as "sub-otti" was a mistake. It appeared that the price Rs. 1,500 was the same as in the previous mortgage.

Held, that this document did not show that *P* transferred or purported to transfer full ownership in the land and that what was transferred was only whatever rights the transferor possessed which were not those of a full owner but only those of a mortgagee, and consequently the plaintiff's suit for redemption of the mortgage after 12 years from the date of this document was not barred by Art. 134 of the Limitation Act.

Per Odgers, J.:—The real test when applying Art. 134 of the Limitation Act would be "Did the transferee ask for and obtain an absolute right in the property and believe himself that he was having an absolute interest in it?"

Muthaya Shetti v. Kanthappa Shetti, (1915) 34 M L J 431 an Appeal No. 182 of 1921 referred to.

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*S A No. 324 of 1922. 13th October, 1925.

Lakshmana Aiyar v. Sankarapandiam Pillai.

Second Appeal against the decree of the Court of the Additional Subordinate Judge of Tinnevelly in A. S. No. 152 of 1921 (A. S. No. 395 of 1920 on the file of the District Court of Tinnevelly) presented against the decree of the Court of the District Munsif of Tenkasi in O.S.No.13 of 1920 (O. S. No. 441 of 1919 on the file of the Court of the Temporary Additional District Munsif of Tinnevelly) and O. S. No. 191 of 1919 on the file of the Court of the District Munsif of Koilpatti.

C. V. Anantakrishna Aiyar for appellant.

T. M. Krishnaswami Aiyar and *A. Swaminatha Aiyar* for respondents.

The Court delivered the following

Spencer, J.

JUDGMENTS :—*Spencer, J.* :—I agree with my learned brother's construction of the document (Ex. V) which is before us. As observed by him, this is a very extraordinary document because, if it purported to be an absolute sale and if it purported to pass the rights of a full owner, there was no occasion to recite the transferor's enjoyment of the land under mortgages and sub-mortgages which had not been redeemed. For the respondents two cases to which I was a party have been cited, *Kannuswami Thanjirayan v. Muthuswami Pillai* (1) and an unreported case, Appeal No. 182 of 1921. The principle upon which those suits were decided was that if a defendant in possession of immoveable property puts forward a defence of limitation under Art. 134 against a suit for redemption, there is no onus on him to first prove that he obtained a transfer in good faith of that property, or, as stated in *Kannuswami Thanjirayan* v. *Muthuswami Pillai* (1), "it was not incumbent on the purchaser to prove that he had no notice of the restricted nature of the vendor's title." No issue was raised in the present case as to whether Kadir Mohideen Rowther acted in good faith when he took Ex. V. The circumstances of the case are such that both the transferor and the transferee must have known that the transferor was unable to confer a higher right than that of a sub-mortgagee on the transferee, and if neither the transferor nor the transferee could have honestly believed that the full ownership was being passed by this document, it will not be of any avail to the defendants who derive their rights from Kadir Mohideen Rowther to show that there are some words in that document, as altered before registration, which might be construed as if

1. (1917) M W N 5.

Lakshmana Aiyar v. Sankarapandiam Pillai.

Spencer, J.

they were the words of a person possessing such rights as would enable him to pass a title of full owner to his transferee, while leaving the consideration for the transfer unaltered. Under these circumstances I do not think that it can be maintained that there was an animus to pass anything more than an assignment of the mortgage rights which were vested in the transferor. I therefore agree that the appeal should be allowed and the District Munsif's Court's decree restored with costs in this Court and in the Lower Appellate Court.

Odgers, J.

Odgers, J. :—The first thing to be decided in this appeal is the character of Ex. V. The preceding documents are two undisputed usufructuary mortgage deeds, Exs. C and C-1, Ex. C being of 1873 and being effected by one Sankarapandiam Pillai in favour of Madappa Muppan. It is in the ordinary form usufructuary for three years, the mortgagee to pay the assessment and at the end of the period the ordinary covenant to repay and redeem. Exhibit C (1) is a sub-mortgage of 1883 in favour of Shanmukham Pillai by Madappa Muppan. It recites the usufructuary mortgage of 1873, is for a period of one year with the stipulations that the sub-mortgagee shall pay the assessment and the usual covenant to redeem. The equity of redemption on Ex. C was attached and sold in Court-auction in 1875 and the predecessor-in-title of the plaintiff purchased it as evidenced by Ex. B, so that at the date of Ex. V, 1893, we have the equity of redemption outstanding on the head mortgage in the plaintiff or his predecessor-in-title and we have the equity of redemption outstanding on the sub-mortgage, Ex. C (1), in Madappa Muppan. In 1893 the son of Shanmukham Pillai, the sub-mortgagee in Ex. C (1), Paramasivam Pillai, executed Ex. V to the defendant. Exhibit V is called a sub-mortgage deed, sets out the head mortgage Ex. C, the sub-mortgage Ex. C (1) and the consideration therefor Rs. 1,500 and proceeds, " And I had been enjoying it (the land) in virtue thereof (*i. e.*, the sub-mortgage)." It further recites disputes between the executant of the document (Ex. V), to give him a neutral name, and the executees which culminated in O. S. No. 353 of 1892. Stated shortly, the defendants here set up a prior title to the mortgagors in Ex. C by virtue of a sale deed in 1864. This was found to be a forgery and they lost the case. The document, Ex. V, further recites :—

"As I have also become entitled to that land as full owner in virtue of the statement made in that suit by the sons of the original pattadar Sankara-

Lakshmana Aiyar v. Sankarapandiam Pillai.

Odgers, J.

pandiam Pillai that they did not wish to have any right to the same and that the ottidars themselves might enjoy it as full owners."

Now that is a peculiar statement to find in a sub-mortgage deed as this document originally purported to be. To begin with, it is untrue, because whatever the sons of the original mortgagor said in the course of Suit No. 353 of 1892, the equity of redemption which they or their father originally possessed had passed from them by the execution proceedings in 1874 or 1875. Further, the statement completely ignores the equity of redemption still outstanding in Madappa Muppan, the sub-mortgagor in Ex. C (1). It is curious to find a statement of title of that sort, particularly after he has carefully recited his title as sub-mortgagee in this document which originally purported to be a sub-mortgage and nothing else. After reciting this so-called title to full ownership he continues, " I have sub-mortgaged to you the right belonging to me in the said land and received Rs. 1,500, " which, it will be noted, is the amount of the original mortgage Ex. C and also the amount of the prior sub-mortgage, Ex. C (1). The executant covenants at the cost of the mortgagee to obtain and deliver to him " the records connected herewith which are in Courts and other places. " Now before registration this document was corrected and the correction states that the description of the document as a sub-otti is a mistake and as to the recitals on the 4th page of the document the proper translation runs somewhat as follows :—

"As shown on the fourth page you will enjoy it in sole right. You are to enjoy it yourself. I have no other rights. I have sold you full rights."

Now the question arises, as I have stated at the beginning, what exactly was purported to be passed by the transferor by this document. That they intended something more than a sub-mortgage is obvious from the alterations. But there are still two alternatives. They may have intended that the sub-mortgagee should drop out and there should be what in English Law we should call an assignment of the mortgage right ; or, as contended by the respondents and as found by the Subordinate Judge in this case, the second alternative is that the parties may have intended an out and out sale of the full ownership or fee simple of the land in question. I do not think, on examining the document, that much help can be obtained by the recital as to the full ownership having been acquired by the disclaimer of the original mortgagor's sons in the suit in 1892. Why it should have been inserted in a deed which obviously at first was a sub-mortgage I cannot conceive.

It was there obviously out of place. It was also, as I have pointed out, untrue. Now the question is, did the executant of Ex. V purport to represent that he had the full ownership in the land and that he was passing it by this deed? Did the mortgagee think that he was obtaining the full ownership by means of this deed? The matter has been well put, if I may say so, in *Muthaya Shetti* v. *Kanthappa Shetti* (2), a case decided by Seshagiri Aiyar and Bakewell, JJ., where they say :—

"The question whether the transferee from a mortgagee took an absolute interest or only a mortgage interest is a question of intention."

They there refer to the Privy Council case in *Radhanath Doss* v. *Gisborne* (3), where their Lordships held that the burden of proving that the purchaser acquired an absolute interest in the property lay on such purchaser. And the learned Judges in the case under reference further point out that, if the transferee bargained for and believed he was bargaining only for the interests of the mortgagee, he cannot acquire title as an absolute owner of the property." And Bakewell, J. said :—

"If, on the other hand, the title adduced by the vendor and the deed of transfer to the purchaser are consistent with an intention to transfer an absolute interest, the burden will lie upon the plaintiff to show that the circumstances of the transfer negative such an intention."

In *Veerabhadra Tevan* v. *Veerappa Tevan* (4) Wallis and Sankaran Nair, JJ. said :—

"It was for the defence to prove a purchase affirmatively to bring the case under Art. 134."

The matter has been lately considered in a case to which my learned brother was a party—Appeal No. 182 of 1921, apparently not yet reported. The cases I have already referred to were referred to in their judgment and my learned brother there stated :—

"I think that both seller and purchaser must have honestly believed that the entire interest of the owner was being transferred by the document."

Ramesam, J. cited the passage from Seshagiri Aiyar, J.'s judgment that I have already cited. Now how does the so-called purchaser in this case prove that what was purported to be transferred to him was really an absolute title? He relies on the recital in the document about the acquisition of full rights to which for the reasons I have given I am unable to attach any weight. He also refers to the second transaction which purports to transfer full rights. But when this is taken

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2. (1915) 34 M L J 431. 3. (1871) 14 M I A 1.
4. (1912) 15 I C 609.

Lakshmana Aiyar *v.* Sankara-pandiam Pillai.

Odgers, J.

in conjunction with the recital which is unaltered setting out the prior transactions, Exs. C and C (1), and definitely reciting that the executant has been enjoying "in virtue thereof," it seems to me that the transferee cannot be heard to say that under those circumstances he thought he was acquiring an absolute title to the land. The question is, as I have already said, in *Muthaya Shetti* v. *Kanthappa Shetti* (2), is one of intention and Seshagiri Aiyar, J., there says :

"The real test would be, did he, *i. e.*, the transferee, ask for and obtain an absolute right in the property and believe himself that he was having an absolute interest in it?"

It seems to me on the best consideration I can give to the terms of this document, that no reasonable man, particularly a man in the position of the defendants here, who had already fought the question of their title to this land in 1892 and failed, could possibly have supposed that this document was transferring to him or purported to transfer to him an absolute interest in the land. The price, it will be observed, was the same as in the previous undisputed mortgage. One would have expected that if the entire interest as owner of the land were purported to be passed, the price would have been increased. As a matter of fact, the mortgage price is lessened because the Rs. 1,500 was not only the original amount of the sub-mortgage but also included costs and mesne profits. That seems to me to be a very significant circumstance against the full ownership of the land being passed. The learned Subordinate Judge who came to an opposite conclusion reversing the decision of the District Munsif who held that Ex. V was an assignment of whatever rights the transferor possessed and that those rights were not those of a full owner, held that it was more probable that Paramasivam Pillai wanted to treat the property absolutely as his own. I cannot agree, and in my opinion, on the grounds that I have pointed out, I think that all that was transferred by Ex. V was the full interest of the mortgagee. That is to say, Ex. V was converted from a sub-mortgage into an assignment of the rights of the sub-mortgagee. In my opinion, for these reasons, the appeal should be allowed and the decree of the Subordinate Judge reversed with costs here and in the Lower Appellate Court, and the judgment of the District Munsif restored with his directions as to costs in that Court. Time for redemption four months from this date.

N. S. *Appeal allowed.*

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2. (1915) 34 M L J 431.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE DEVADOSS.

Settikara Venkatarama Chettiar and others ... *Appellants** (*Defendants* 7, 11 *and 6th defendant,* 10*th defendant's L. R.*)

v.

O. P. Damodaram Chettiar and others ... *Respondents* (*Plaintiffs* 1 *to* 6, 9 *to* 21—*Defendant* 1 *and L. R. of* 8*th defendant*).

Venkatarama Chettiar v. Damodaram Chettiar.

Trust—Trusteeship hereditary—Deed conferring—What amounts to—Construction—Religious endowment—Founder—Person who collects subscriptions and founds an endowment if founder thereof—Vesting of hereditary trusteeship by him in himself—Legality—Civil Procedure Code, S. 92—Scheme under—Framing of—Principles to guide Court in—Interests of individuals if and when may be disregarded—Removal of trustees—Mismanagement—Finding as to—Necessity—Hereditary trustees—Appointment of others along with—Court's power of.

A deed of trust executed by *V* in favour of nineteen persons known as Chettithanakars stated that he alone was unable to make and set up idols of Ramalingam and Choudeswari Amman in the Choudeswari Amman Temple Devasthanam built by him and that the nineteen persons agreed to raise a fund and to put up the idol in the temple and according to the agreement that they set up the idols of Ramalingam and Choudeswari Amman and that they agreed to purchase property for endowing the temple, and the document then went on to state "that the nineteen persons should manage the temple from generation to generation." Funds were collected by *V* and by the nineteen persons mentioned in the document; they built the temple, installed the idols in it, and collected funds for the upkeep of the temple and managed the temple under the deed of trust.

Held, that the deed of trust conferred the hereditary right to the trusteeship upon *V* and the nineteen Chettithanakars.

A person, who collects subscriptions from various persons and builds a choultry or a temple, has a right, in the absence of a declaration to the contrary made by the subscribers at or about the time when the subscriptions were collected, to direct in what manner the institution should be managed and what right the trustees should have in the management of that institution. The person so collecting the subscriptions and building the temple or choultry is the founder and may, in the absence of a stipulation to the contrary by the subscribers, himself have the hereditary right of management.

In framing a scheme under S. 92, Civil Procedure Code, the Court should primarily look to the interests of the institution rather than the right of individuals. Where the interests of the institution require that certain trustees should be removed the Court can do so without actually finding that they are guilty of mismanagement provided their remaining as trustees is incompatible with the management of the institution or the number of trustees is so large that it will not be possible for any scheme to work with all of them as trustees.

*S A No. 238 of 1925. 26th November, 1925.

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No doubt in framing a scheme the Court should not lightly exclude the interests of hereditary trustees and others.

In framing a scheme under S. 92, Civil Procedure Code, the Court is entitled to take into consideration the past history of the institution, and the way in which the management has been carried on heretofore.

In a case in which there were nineteen hereditary trustees of a temple known as the Chettithanakara, the Court finding that the management by all the nineteen would not be possible, framed a scheme providing for a board of nine trustees of whom three should be elected by the Chettithanakars from among their number and four by all the beneficiaries including the Chettithanakars, one to be elected by those who had paid or paid Rs. 1,000 or more towards the temple at a time, and one to be nominated by the eldest member of the family of the founder. It appeared that, though there were nineteen trustees, all the affairs of the temple were in fact managed by one of them for 30 years past with hardly any restraint from the other trustees.

Held, that the trustees were not removed from the trusteeship under the scheme, and that they could not, in any event complain of the appointment of a few trustees to manage the property along with three of the so-called hereditary trustees.

The Court has power under S. 92 to appoint additional trustees to manage charitable or religious trusts along with hereditary trustees.

Second Appeal against the decree of the District Court of Salem in A. S. No. 60 of 1922 preferred against the decree of the Court of the Subordinate Judge of Salem in O. S. No. 51 of 1920 (O. S. No. 17 of 1920 on the file of the District Court, Salem).

T. R. Ramachandra Aiyar and *S. R. Dikshit* for appellants.

The Advocate-General and *K. S. Sankara Aiyar* for respondents.

The Court delivered the following

JUDGMENT :—The plaintiffs have brought this suit under S. 92, Civil Procedure Code, for framing a scheme for the management of Ramalingam and Choudeswari Amman temple in Andichetty Street, Cogai, Salem. The 1st defendant is a managing trustee of the temple and defendants 2 to 10 are trustees of the temple who aided and instigated the 1st defendant in his various misdeeds and breaches of trust. In the plaint the plaintiff alleged various acts of mismanagement against the 1st defendant who denied all of them and opposed the framing of the scheme. When the case came on for trial the plaintiffs and the defendants did not press for the trial of all the issues raised in the case. They agreed to the Court framing a suitable scheme for the proper management of the institution. The plaintiffs did not press for the removal of the defendants from office and the defendants did not press

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for the trial of the case on the merits and waived their objection to the validity of the sanction obtained by the plaintiffs from the Collector for the institution of the suit. The Subordinate Judge of Salem framed a scheme and provided for a Board of nine trustees of whom three should be elected by the Chettithanakars from among their number and four by all the beneficiaries including the Chettithanakars and one to be elected by those who pay or have paid one thousand rupees or more towards the temple at a time, and one should be nominated by the eldest member of the family of Nungavalli Venkatarama Chettiar, the founder of the temple. The defendants 2, 3, 4, 7 and the legal representative of the 10th defendant appealed to the District Judge, Salem, who dismissed their appeal. They have preferred this second appeal.

Two points are raised in this appeal : one is, that the 19 Chettithanakars are hereditary trustees and (2) that they should not have been removed without finding that they were guilty of misconduct and not fit to be trustees. The District Judge, on a consideration of the evidence in the case, has come to the conclusion that the 19 Chettithanakars among whom some are plaintiffs and some defendants, are not hereditary trustees.Ex. A is the deed of trust dated 9th January, 1925 executed by Venkatarama Chetti in favour of 19 persons. In that he stated that he alone was unable to make and set up idols of Ramalingam and Choudeswari Amman in the Choudeswari Amman Temple Devasthanam built by him and that the 19 persons agreed to raise a fund and to put up the idol in the temple and according to the agreement that they set up the idols of Ramalingam and Choudeswari Amman and that they agreed to purchase property for endowing the temple and the document goes on to state "that the 19 persons should manage the temple from generation to generation. The contention of the learned Advocate-General is that the document does not confer hereditary right upon the 19 persons mentioned in Ex. A. It is clear from the documents that funds were collected by Venkatarama Chetti and by the 19 persons mentioned in it; that they built the temple, installed the idols in it and that they collected funds for the upkeep of the temple and managed the temple under Ex. A. The recital as regards the devolution of the management is to manage the same from generation to generation performing the daily *pooja, aradhanai,* festivals and other things regularly and live happily as long as the Sun and Moon last." There is a further re-

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cital to the same effect after mentioning the properties of the temple "the properties are delivered to you as being fit to be managed, held, and enjoyed from generation to generation by setting up the idols of Ramalingam and Choudeswari Amman and others as stated above". From the document it is clear that Venkatarama Chetti and the 19 persons intended that the management should be in their families. Considering the Hindu sentiment as regards the hereditary management of trust institutions it cannot be successfully urged that the parties to Ex. A did not intend that the right to trusteeship should be in their families.

The next contention of the learned Advocate-General is that the persons mentioned in Ex. A collected subscriptions from various persons and they could not be said to be the founders of the temple and therefore they had no right to confer hereditary right of management upon themselves or others. Where a person collects subscriptions from various persons and builds a choultry or a temple he has a right to direct in what manner the institution should be managed and what right the trustees should have in the management of that institution. This is recognised by the Hindu Law. There is nothing illegal or improper in a person who builds a temple whether out of his own funds or out of the funds collected by subscriptions or getting donations from people to create a trust and endow it, directing by the deed of endowment, in what manner and by whom it should be managed. The case in *Ananda Chandra Chuckerbutty* v. *Braja Lal Singh* (1) does not help the respondent. Justice Mookerjee observes at page 301:

"If a number of persons provide the original endowment, they may apparently together constitute the founder· *Re St. Leonard* (2). . . As stated by Lord Mansfield in *St. John's College* v. *Todington* (3), a charitable foundation, in so far as it is charitable, is the creature of the founder, and on this view Lord Hardwicke ruled in *Green* v. *Rutherford* (4) that the founder may provide for the government and administration of his creature."

In the matter of the Endowed Schools Act, 1869, and *In the matter of the St. Leonard, Shoreditch, Parochial Schools and the Endowments relating thereto* (5) it was held that it was open to a number of persons to collect subscriptions and endow an institution and provide for its management and that the persons who collected the subscriptions and endowed the institution were the

1. (1922) I L R 50 C 292.
2. (1884) 10 A C 304.
3. (1757) 1 Burr. 158, 200.
4. (1750) 1 Ves. Sen. 462, 472.
5. (1884) 10 A C 304.

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founders and they had the right to provide for its management and for its devolution. If persons invite subscriptions on a representation that they would devote the subscriptions so collected to a particular purpose and they divert the subscriptions to some other purpose the subscribers have to object to the funds being diverted to other purposes than those for which they were collected. But so long as the subscribers do not object to the person or persons collecting subscriptions for building or endowing any particular institution, the person or persons so building or and endowing it have the right to provide for its management for all time to come. There is nothing in the evidence to show that the persons who gave subscriptions gave them on the understanding that the founders should not have the hereditary right of management. All that appears from Ex. A is, that subscriptions were collected, funds were raised, a temple was built and idols were installed, and the management was in the hands of Venkatarama Chetti and others and all of them. Venkatarama Chetti and 11 persons agreed that the temple should be a trust and should exist for all time to come and the management should be hereditary in their families.

In *Attorney-General* v. *Clapham* (6), Lord Cranworth, Lord Chancellor observes at page 652:

"Where a fund is raised for a charitable purpose like that of founding a chapel and the contributors are so numerous as to preclude the possibility of their all concurring in any instrument declaring the trusts, but such a declaration is made by the persons in whom the property is vested, at or about the time when the sums have been raised, that declaration may reasonably be taken *prima facie* as a true exposition of the minds of the contributors. The presumption is, that the trusts declared were those which the contributors intended. It would be open to them, if the trusts were not so framed as to effect the object they had in view, to take steps for getting any errors corrected. If no such steps are taken, it must be assumed that the instrument declaring the trusts fairly embodies the intentions of the contributors."

I therefore hold that the 1st defendant, the other defendants and the Chettithanakars have a hereditary right to manage the temple affairs.

The next question is, whether the order removing the trustees is legal in the absence of a finding that they were guilty of breach of trust. The Subordinate Judge has not actually removed the trustees from management. What he has done is, finding that the management by 19 persons would not be possible he has given them the right to elect 3 of their own number as trustees, and 4 others are eligible for election

6. (1855) 43 E R 638 : 4 De G M & G 591 at 592.

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by all the beneficiaries including the Chettithanakars. The Chettithanakars are the head men of the community. Each group of families has one man to manage its communal affairs and that man is called a Chettithanakar. There were at the time of Ex. A, 19 Chettithanakars. It is now represented that there are about 30 of them

Granting for argument's sake that the defendants have been removed from the trusteeship it cannot be said that the order of the Subordinate Judge is illegal. S. 92, Civil Procedure Code, gives power to the Court to frame a scheme of management "where the Court finds that for the proper administration of a trust, charitable or public, that a trustee should be removed, it has power to do so without finding that the trustee is guilty of mismanagement". S. 92 was specially enacted in the interests of public, charitable and religious trusts. The Court should primarily look to the interests of the institution rather than the right of individuals. Where the interests of the institution do require that certain trustees should be removed the Court can do so without actually finding that they are guilty of mismanagement provided their remaining as trustees is incompatible with the proper management of the institution or that the number of trustees is so large that it will not be possible for any scheme to work with all of them as trustees. No doubt in framing a scheme the Court should not lightly exclude the interests of hereditary trustees and others. But where the Court finds that their continuance could not be for the welfare of the institution and is not conducive to the proper working of the scheme it should not hesitate to remove them. But where they can be retained without any detriment to the institution the Court may do so. This principle was followed by the learned Chief Justice and Phillips, J. in *Muthiah Chetti* v *Periannan Chetti*(7) at p. 234:

"Though the past user of the institution is not binding on us in framing a scheme under the section yet it may well be taken into account and departed from only as far as may be necessary."

It is unnecessary to discuss this point further as I hold that the trustees were not removed from the trusteeship under the scheme. The contention of Mr. T. R. Ramachandra Aiyar for the appellant is that all the ten persons should be trustees. It will not be possible to have 19 persons as trustees and from their past conduct it is clear that all the affairs were managed by the 1st defendant on behalf of all the trustees and

7. (1916) 4 L W 228.

this has been so not only during the lifetime of Venkatarama Chetti but also during the time of the 1st defendant. When for the last 30 years only one man has been managing the temple with hardly any restraint from the other trustees they have no reason to complain if the scheme provides for at least three of them being on the committee. As observed by their Lordships of the Privy Council in *Muhammad Ismail Ariff* v. *Ahmed Moola Dawood* (8):—

"In giving effect to the provisions of the section and in appointing new trustees and settling a scheme, the Court is entitled to take into consideration not merely the wishes of the founder, so far as they can be ascertained, but also the past history of the institution, and the way in which the management has been carried on heretofore, in conjunction with other existing conditions that may have grown up since its foundation. It has also the power of giving any directions and laying down any rules which might facilitate the work of management, and, if necessary, the appointment of trustees in the future."

It is frankly conceded by Mr. Ramachandra Aiyar that the Court has power under S. 92 to appoint additional trustees to manage charitable or religious trusts along with hereditary trustees. This point was settled so long ago as 1905 in *Prayag Doss Ji Varu Mahant* v. *Thirumala Srirangacharlu Varu* (9). If additional trustees can be appointed to manage trusts along with hereditary trustees it is difficult to see how the appellants could complain when a few trustees are appointed under the scheme to manage the property along with three of the so-called hereditary trustees. In case of this kind as already observed it is not the interest of private individuals that should be considered paramount. The interest of the institution is of paramount importance and the Court should have that in view in framing a scheme. In this case the interests of the defendants is safeguarded by three at least of the members being on the board of management. In this view it cannot be said that the rights of the Chettithanakars have been overlooked by the Subordinate Judge in framing a scheme.

I think the scheme as framed is a proper one and the appellants have no reason to complain that their rights have been overlooked. In the result the appeal fails and is dismissed with costs.

A.S.V. *Appeal dismissed.*

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8. (1916) I L R 43 C 1085 at 1101 : 31 M L J 290 (P C).
9. (1905) I L R 28 M 319 : 15 M L J 133.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE DEVADOSS.

Valliakkal and another ... *Appellants** (*Defendants*).

v.

Karuppa Goundan ... *Respondent* (*Plaintiff*).

Valliakkal v. Karuppa Goundan.

Specific Relief Act, S. 31—Compromise decree—Rectification of mistake in—Suit for—Maintainability.

A suit lies to rectify a mistake in a compromise decree.

A compromise decree is an instrument in writing within the meaning of S. 31 of the Specific Relief Act.

Second Appeal against the decree of the Court of the Subordinate Judge of Coimbatore in A. S. No. 1 of 1923 (A. S. No. 38 of 1923 on the file of the District Court of Coimbatore) preferred against the decree of the Court of the District Munsif of Udamalpet in O. S. No. 1011 of 1921.

V. Narasimha Aiyangar for appellants.

T. M. Krishnaswami Aiyar for respondent.

The Court delivered the following

JUDGMENT :—The first point raised in this second appeal is that no suit lies to rectify a mistake in a compromise decree. It was held by Napier and Krishnan, JJ. in S. A. No. 62 of 1920 that a decree is an instrument within the meaning of S. 92 of the Evidence Act. If a compromise decree is an instrument in writing, it is difficult to see how S. 31 of the Specific Relief Act does not apply to it. The contention of Mr. Narasimha Aiyangar is that a suit does not lie to rectify a mistake in a compromise decree, but that the decree could only be set aside *in toto* and the parties relegated to the position in which they were before the compromise was entered into. Section 31 of the Specific Relief Act provides for a suit to rectify a mutual mistake in an instrument in writing. The opening words of S. 31 are—

"When, through fraud or a mutual mistake of the parties, a contract or other instrument in writing does not truly express their intention, either party, or his representative-in-interest may institute a suit to have the instrument rectified."

Mr. Narasimha Aiyangar relies upon *Ram Lagan Sahu* v. *Ram Birich Koeri* (1) as supporting his contention. No doubt, in that case the learned Judges observed—

"Once the decree has been passed and signed, then the remedy is, except in cases to which S. 152 of the Civil Procedure Code applies, to institute a suit to set aside that decree on one of the grounds aforesaid."

*S A No. 1534 of 1923. 28th July, 1926.

1. (1919) 4 Pat L J 205.

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They rely on *Wilding* v. *Sanderson* (2) for their position. In that case it was held that if the Court was satisfied that a mistake was committed in a compromise decree, the Court was competent to amend the decree to bring it in conformity with the intention of the parties. It is therefore clear that when a mistake has been committed in drawing up a compromise petition and that mistake finds place in the decree embodying the terms of the compromise, it is open to the Court to have that rectified in a subsequent suit. Reference may also be made to *Tiruvambala Desikar* v. *Manickavachaka Desikar* (3).

The next contention is that the Lower Courts have not correctly construed the compromise decree. What was divided between the plaintiff and the defendants was 32 acres 98 cents. The defendants were given 20 acres exclusive of the rocky portion and the plaintiff was given 12 acres 98 cents exclusive of the rocky portion. It is not suggested that there was any fraud played by one party on the other at the time of the compromise. From the plan and report of the commissioner, it is clear that the rocks are dotted all over with fields, and the extent of the rocky portion is between 2 to 3 acres. If that is deducted from the total extent, the parties cannot possibly have 20 acres, and 12 acres and 98 cents. The Tamil expression used is பாறைத் நீக்கலாக with regard to both the plaintiff's portion and the defendants' portion. Evidently what was intended to be meant was "inclusive of the rocky portion" and not "exclusive of the rocky portion." Both the Courts have come to the conclusion that it was a *bona fide* mistake committed by both the parties at the time of drawing up the compromise petition and it does not appear to be anything other than a mistake committed by both the parties at the time.

Mr. Narasimha Aiyangar's complaint is that no oral evidence was adduced and therefore the Courts were not in a position to determine what the nature of the mistake was. It was for the appellants to have adduced oral evidence to show the nature of the mistake but they have not done so. Both the parties have not adduced any oral evidence. It does not lie in the mouth of the appellants now to complain that no oral evidence was adduced. Both the Courts have taken into consideration all the circumstances and have come to the conclusion that the mistake was a mutual and *bona fide* one and that the intention of the parties was that both of them should

2. (1897) 2 Ch D 534. 3. (1915) I L R 40 M 177 : 30 M L J 274.

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have the extents assigned to them inclusive of the rocky portions. I hold that both the Courts have rightly held that this is a case for rectification.

In the result, the second appeal fails and is dismissed with costs.

A. S. V. *Appeal dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—MR. JUSTICE RAMESAM AND MR. JUSTICE VENKATASUBBA RAO.

Mandavilli Seetharamamma and another ... *Appellants** (*Defendants*)

v.

Attivilli Suryanarayana, late a minor, by father and guardian Attivilli Venkayya, but now declared a major, *vide* Order, dated 8th March, 1926 on C. M. P. No. 706 of 1926 ... *Respondent* (*Plaintiff*).

Seetharamamma v. Suryanarayana.

Hindu Law—Adoption—Widow—Adoption by—Husband's authority for—Express authority—Meaning—Implication of authority—Permissibility—Conditions—Giving and taking completed in husband's lifetime—Datta homam *performed after his death—Effect on validity of adoption.*

The question was whether the 2nd defendant had been validly adopted by the 1st defendant, the widow of *K*.

The 2nd defendant was living with his natural father at Cocanada and *K* was a resident of Anakapalli. On the 1st of June, 1916, the boy was taken from Cocanada to Anakapalli with a view to his being adopted. Three letters passed between *K* and the father of the 2nd defendant between the 2nd and 7th of June, 1916, which showed that in respect of the contemplated adoption all the terms were settled. An auspicious day was chosen and the adoption was fixed for the 16th of June, 1916. In the meantime, however, that is, on the 10th of June *K* died. The ceremony of adoption was performed on the 24th of June, the boy was formally given and taken and there was also the performance of *datta homam*.

Held, that the only reasonable inference from the proved facts was that *K* gave his consent to his widow making the adoption.

Held further, that the secular act of giving and taking the boy having been completed in the lifetime of *K* the religious act of *datta homam* essential to complete the adoption might be performed subsequent to his death.

The phrase "express authority of the husband" so often used in decisions means nothing more than an affirmative indication enabling the widow to adopt, which can be traced to the mind of the husband. The word "express" is not used in opposition to the word "implied" and an authority can be implied from

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*S. A. No. 708 of 1923. 26th April, 1926.

Seetharamamma v. Suryanarayana.

the facts of a particular case. In all cases where the process of adoption has begun by a giving and taking in the lifetime of the adopting father there is a clear indication of his desire and no further authority is needed to enable the widow to adopt. It should be necessarily implied in such taking by the adoptive father.

Second Appeal against the decree, dated 26th September, 1922 of the District Court of Vizagapatam in A. S. No. 408 of 1920 preferred against the decree, dated 20th April, 1920, of the Court of the Subordinate Judge of Vizagapatam in O. S. No. 25 of 1919.

G. Lakshmanna and *A. Satyanarayana* for appellants.

B. Satyanarayana and *C. Rama Rao* for respondent.

The Court delivered the following

JUDGMENTS :—*Ramesam, J.*:—I have had the advantage of perusing the judgment of my brother Venkatasubba Rao, J. I will add a few reasons for agreeing with it.

Ramesam, J.

In the first place I agree with him in thinking that the phrase "express authority of the husband" so often used in decisions means nothing more than an affirmative indication enabling the widow to adopt, which can be traced to the mind of the husband. The word "express" is used in opposition to the state of the law in Bombay where non-forbidding of adoption by the widow is taken as equivalent to authorisation. In *Sri Virada Pratapa Raghunada Deo* v. *Sri Brozo Kishoro Patta Deo* (1) we have got the words "express authority" in two places at page 77, and at page 78 "express permission". The Judicial Committee then referred to Justice Holloway's opinion in the Ramnad case and to the manner in which it was dealt with by the Judicial Committee. They said :—

"It pointed out that on the question—who are the kinsmen whose assent will supply the want of a positive permission from the husband, etc."

Thus it is clear that the word "express" is not used in opposition to the word "implied" and an authority can be implied from the facts of a particular case. In *Subbarayar* v. *Subbammal* (2) their Lordships say—

"In the circumstances of the case the direction in the will most clearly implied that *datta homam* should precede the *upanayanam*."

Secondly, there are two essentials requisite for the validity of an adoption : (1) Giving and taking, (2) *Datta homam* (only in certain cases). Where only the giving and taking is complete but the case is one which requires *datta homam*, it

1. (1876) I L R 1 M 69 (P C). 2. (1898) I L R 21 M 497 at 502.

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Ramesam, J.

may be said that process of adoption has begun but is not completed until *datta homam* is performed. In such cases it has been held that the *datta homam* may be performed later on even if both the natural parents of the boy are dead. [*Venkata* v. *Subhadra* (3)]. It is true that in the ceremony of *datta homam* there is always a formal giving and taking even if previously there had been an informal giving and taking and because of this Mr. Satyanarayana contends for the respondent that the first giving and taking is nothing and the second giving and taking is everything and it cannot be said that the process of adoption has begun, for, he asks, if the first giving and taking has any significance why should it be repeated in the *datta homam* ceremony ? The reply to this argument is that the repetition is a purely formal matter and if the giving and taking in the course of *datta homam* is the only real giving and taking, it could not be held that the *datta homam* can be performed by a relation after the death of both the parents as has been held in *Venkata* v. *Subhadra* (3) for an orphan cannot be given away. It follows therefore in all cases where the process of adoption has begun by a giving and taking in the lifetime of the adopting father there is a clear indication of his desire and no further authority is needed to enable the widow to adopt. It should be necessarily implied in such taking by the adoptive father. In the practical application of this rule no doubt some caution will have to be observed. There may be cases where a boy is brought merely for trial, that is, kept on probation. It cannot be said in such cases there is a complete giving and taking on account of the temporary parting of the parent's custody. But where it has been settled that the boy should be adopted and his custody has been parted with by the parents finally and a date is fixed for the *datta homam* ceremony and a few days before that the adopting father dies by a sudden attack of colic or other disease and nothing has happened after the bringing of the boy to show that the adoptive father has changed his attitude towards the boy, such facts constitute a cogent indication of the husband's wishes which enable the widow to adopt. It is said that this point was not raised in the Courts below. In the similar case of *Subbarayar* v. *Subbammal* (2) also, there was no issue but on the ground that all the facts were known and there was no prejudice, their Lordships affirmed the decree on the ground of a taking and acceptance at a different date from that found

2. (1898) I L R 21 M 497. 3 (1884) I L R 7 M 548.

by the Lower Court. In the present case the facts were pleaded in the written statement and found by the Courts below.

Ramesam, J.

I agree with the order proposed by my learned brother. The memo of objection is dismissed. No order as to costs.

Venkatasubba Rao, J.

Venkatasubba Rao, J. :—The plaintiff is the daughter's son of one Kurmanadham, deceased, and he files the suit for a declaration that the 2nd defendant has not been validly adopted by the 1st defendant, the widow of Kurmanadham.

The defendants relied upon oral authority said to have been given by Kurmanadham some four hours previous to his death on the 10th of June, 1916. Both the Lower Courts have disbelieved the specific case set up and have allowed the plaintiff's claim. This is a finding of fact and we cannot interfere with it in second appeal. On behalf of the defendants, however, the case has been presented to us from a somewhat different standpoint. In regard to the facts upon which depends the question of law raised, there is no dispute. The 2nd defendant was living with his natural father at Cocanada and Kurmanadham was a resident of Anakapalli. On the 1st of June, 1916, the boy was taken from Cocanada to Anakapalli with a view to his being adopted. Three letters passed between Kurmanadham and the father of the boy between the 2nd and the 7th of June, 1916, which show that in respect of the contemplated adoption all the terms were settled. An auspicious day was chosen and the adoption was fixed for the 16th of June, 1916. Unfortunately, in the meantime, on the 10th of June, Kurmanadham died. The ceremony of adoption was performed on the 24th of June, the boy was formally given and taken and there was also the performance of *datta homam.*

These facts are clearly set forth in the written statement of the defendants and are found to be true by the learned District Judge. We are not therefore called on to deal with the evidence in the case, the only question to be decided being, what is the legal effect of the facts found. Mr. Lakshmanna, the learned vakil for the defendants, puts his case in two ways. He says first, from the facts found, the husband's consent to his wife making the adoption may be implied. Secondly, that the secular act of giving and taking the boy having been completed in the lifetime of the husband, the religious act of *datta homam* essential to complete the adoption may be performed subsequent to his death.

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Venkatasubba Rao, J.

If either of these contentions is accepted, the appeal must be allowed and in my opinion both these propositions are sound.

In regard to the first contention, the question resolves itself into this: Can a husband's consent or authority be implied from his conduct ? If in law it can be implied, the facts of the present case lead almost to an irresistible conclusion that the wife did have the necessary authority. While the law says that the widow must have her husband's consent, it does not restrict the manner in which that consent may be given. Whether consent was given is a question of fact and I fail to see why it cannot be implied from conduct. The plaintiff's learned vakil points out that what is recognised in the decisions is the husband's "express consent". It is undoubtedly true that in the decisions of the highest authority, the expression used is "express consent". But what does that expression mean ? In the leading case on the subject, *The Collector of Madura* v. *Muthuramalinga Sethupathi* (4), the Privy Council point out how the various schools in India accepting the same text as their authority, have developed different rules of law in regard to the widow's power of adoption. Their Lordships observe :—

"All the schools accept as authoritative the text of Vasishta; which says; 'Nor let a woman give or accept a son unless with the assent of her lord.' But the Mithila school apparently takes this to mean that the assent of the husband must be given at the time of the adoption, and therefore that a widow cannot receive a son in adoption, according to the *Dattaca* form, at all. The Bengal school interprets the text as requiring an express permission given by the husband in his life-time, but capable of taking effect after his death; whilst the Mayukha, Kaustubha, and other treatises which govern the Mahratta School, explain the text away by saying, that it applies only to an adoption made in the husband's life-time, and is not to be taken to restrict the widow's power to do that which the general law prescribes as beneficial to her husband's soul."

It is now settled that in Southern India as in Bengal, the husband's assent is required and in the passage quoted above that assent is described as "express permission". These words are used to mark the contrast between the law as accepted by the Bengal school and the Mahratta school. The Mahratta doctrine proceeds upon the view that the adoption being beneficial to the husband's soul, where he has not intimated his prohibition, assent may be assumed. In Bengal and Southern India, on the other hand, assent cannot be inferred from the mere absence of prohibition ; something more is required : there must be positive or affirmative con-

4. (1868) 12 M I A 397.

Seetharamamma v. Suryanarayana.

Venkatasubba Rao, J.

sent given by the husband. Putting it in other words, according to the Mahratta school, if there is no dissent, assent may be assumed. In Bengal and Southern India the absence of dissent or prohibition is not sufficient but positive assent must be proved. If the judgment of the Privy Council in *The Collector of Madura* v. *Muthuramalinga Sethupathi* (4) is carefully read, it will be seen that it is to bring out this distinction their Lordships use the expression "express consent". This distinction is of great importance and cannot be ignored when the law obtaining in different provinces is under discussion. Now it will be observed that in the same judgment besides the word "express," two other words are used in this connection, namely, "formal" and "positive". The expression "express consent" means nothing more than "positive consent". What then is the true rule deducible? If from the circumstances you can infer that the husband did not prohibit the adoption and nothing more, that is not sufficient; but if you can infer that he assented to or authorised the adoption, that is clearly sufficient. The following passage in West and Buhler, 3rd Edn., at page 957 supports my view:

"Any unequivocal indication of his assent would probably be taken as equivalent to an express command."

In this case the only reasonable inference from the proved facts is that the husband gave his consent to his widow making the adoption and on this ground I would hold the adoption to be valid.

In regard to the second contention of Mr. Lakshmanna, it is clearly borne out by authority. *Venkata* v. *Subhadra* (3) is the converse of the present case. It was the natural father of the boy that died after the gift and the acceptance. At the *datta homam* which was performed subsequent to his death the elder brother of the boy made the formal gift. The learned Judges holding that there was giving and taking in the lifetime of the natural father, upheld the adoption on the ground that the religious rite was essential only to complete the adoption. *Subbarayar* v. *Subbammal* (2) is however a parallel case.The boy was given and taken and subsequently the adoptive father died. The ceremony of *datta homam* was performed by his widow and the adoption was held valid. The principle underlying these cases is, that giving and taking is of the essence of the adoption and the religious part of it

2. (1898) I L R 21 M 497. 3. (1884) I L R 7 M 548.
4. (1868) 12 M I A 397.

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can be deferred to a subsequent period. I am prepared to follow these cases and on this ground also I confirm the adoption.

The result is, the appeal is allowed and the plaintiff's suit is dismissed. The defendants will have their costs of this appeal, but the parties will bear their own costs in the Lower Courts.

A. S. V. *Appeal allowed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE DEVADOSS AND MR. JUSTICE WALLER.

S. K. Karuppan Chetti *alias* Sinna Vellayan Chettiar .. *Appellant** (*Appellant—Plaintiff*)

v.

Maruthanayagam Pillai and another ... *Respondents* (*Respondents—Defendants 2 and 4*).

Karuppan Chetti v. Maruthanayagam Pillai.

Principal and agent—Authority given to agent—Construction of—Authorisation to pay an amount towards a bond—Power of agent to pay for interest—Limitation Act, S. 20

Where an agent is authorised to pay an amount towards the amount of the bond, the authority extends to his paying an amount towards the interest due on the bond and is not confined to his paying only towards the principal. But where the authority is specific that he shall only pay towards the principal, he will not be justified in paying towards interest and the payment will not save limitation under S. 20 of the Limitation Act.

Appeal under cl. 15 of the Letters Patent against the judgment and decree of the Hon'ble Mr. Justice Odgers in S. A. No. 773 of 1922 presented against the decree of the District Court of Madura in A. S. No. 35 of 1921 preferred against the decree of the Court of the District Munsif of Madura Taluk at Madura in O. S. No. 92 of 1920.

M. Balasubramania Mudaliar for appellant.

Respondents not represented.

The Judgment of the Court was delivered by

Devadoss, J.

Devadoss, J :—The only point in this Letters Patent Appeal is whether the authority given to Karuppanna Pillai, Muthukaruppa Pillai and Arumugam Pillai under Ex. A was such as would justify their paying any amount towards interest due on the bond. The learned Judge who heard the second

*L. P. Appeal No. 36 of 1925. 18th February, 1926.

Karuppan Chetti v. Marutha-nayagam Pillai.

Devadoss, J.

appeal held that the authority did not extend to the payment of interest as such. The words in the Tamil document are "இந்தப்பத்திரத் தொகைக்கு சேரில் செலுத்தும்படி". The words mean for paying towards the amount of the bond, *i. e.*, the principal and interest due on the bond. When an agent is authorised to pay an amount towards the total amount of the bond the authority extends to his paying an amount towards the interest due on the bond, for, the total amount of the bond includes principal and interest ; and when there is no restriction on the authority given to the agent that he should pay only towards the principal it cannot be held that the general authority to pay towards the total amount of the bond is confined to paying only towards the principal. Where the authority is specific, that is to say, where the agent is authorised only to pay towards the principal, the agent will not be justified in paying towards interest. But where there is a general authority to pay towards the total amount of the bond, the authority cannot be cut down to mean that the agent is authorised to pay only towards the principal and not towards interest. In this case the agents have paid certain amounts towards interest and the payment is endorsed on the bond which is marked as Ex. A-1. As interest has been paid before the claim under the bond became barred, the appellant has a further period of limitation under S. 20 of the Limitation Act. The appellant's suit is not therefore barred by limitation and he is entitled to a decree against defendants 2 and 4 who are respondents herein. The decrees of the learned Judge and the District Judge are therefore reversed and the appellant will have decree for the plaint amount and subsequent interest against defendants 2 and 4. A decree has already been passed by the District Munsif against defendants 1 and 3. The usual mortgage decree will be passed against all the defendants, *i. e.*, defendants 1 to 4. Defendants 2 and 4 who are respondents herein will pay to the appellant the costs of this appeal, as well as costs of the second appeal and appeal to the Lower Appellate Court. Time for redemption, six months.

This Letters Patent Appeal having been posted for being spoken to this day on the question of the rate of subsequent interest the Court delivered the following

JUDGMENT :—Subsequent interest will be at the rate of 6 per cent. from the date of the decree of the District Munsif.

N. S. *Decree set aside.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—SIR MURRAY COUTTS TROTTER, *Kt.*, *Chief Justice.*

The Union Board of Pattukottai represented by its President R. M. Kasi Chettiar ... *Appellant** (*2nd defendant*)

v.

Athmanatha Aiyar ... *Respondent* (*Plaintiff*).

The Union Board of Pattukottai v. Athmanatha Aiyar.

Madras Local Boards Act, S. 3 (23) (a)—"Road"—"Over which the public have a right of way," whether qualify the whole section.

The words "over which the public have a right of way qualify the whole section and not merely the preceding portion. Consequently where a Local Board finds a strip of land running along the side of the road to which nobody can make out a title, that strip of land does not become part of the road, unless it is proved that the public have a right of way over it.

Second Appeal against the decree of the Court of the Subordinate Judge of Tanjore in A. S. No. 5 of 1924 (Appeal No. 197 of 1923, District Court, West Tanjore) preferred against the decree of the Court of the District Munsif of Pattukottah in O. S. No. 276 of 1920.

K. V. Krishnaswami Aiyar for appellant.

M. S. Venkatrama Aiyar and *R. Srinivasa Aiyar* for respondent.

The Court delivered the following

JUDGMENT :—This appeal must be dismissed with costs. The contention put forward is that this piece of property to which the plaintiff apparently cannot prove his paper title may be deemed to be a road by reason of the definition of "road" in the Madras Local Boards Act, S. 3 (23) (*a*) which runs thus :—

"'Road' includes any road, street, square, court, alley or passage, whether a thoroughfare or not, over which the public has a right of way, together with the drains on either side and with the land, whether covered or not by any pavement, verandah or other erection, which lies on either side of the roadway up to the boundaries of the adjacent property, whether that property be private property or property reserved by Government for other purposes; and also includes the roadway over any public bridge or causeway."

It is no doubt possible to argue that that means that, if a Local Board can find a paddy field running along the side of the road to which nobody is able to make out a good title, that paddy field at once becomes part of the road. That construction is so repugnant to commonsense that I decline to adopt

*S A No. 1292 of 1924. 6th April, 1926.

it ; and wretchedly drafted as this section is, I can hardly put that absurdity on the unknown draftsman. The only way to make sense out of it is to hold that the words "over which the public have a right of way" qualify the whole section. No doubt there would be no great inconvenience because the public have rights of way over many things which are not roads ; but the probability is that the very inconvenience of that construction would be obviated by this, that any strip of land over which the public have a right of way lying on the side of the roadway would almost certainly follow the line alongside the roadway so that really no practical inconvenience would result. I think it is very foolish of the Local Boards to bring up points of this kind at the ratepayers' expense to the High Court and I think the practice should be discouraged as much as possible especially when I mention that the value of this land is said to be Rs. 15 and, I suppose, twenty times that sum has already been expended in costs. If I were an auditor I should surcharge the Board with the costs and disallow them against the ratepayers.

N. S. *Appeal dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE DEVADOSS.

Korlapati Thammayya *alias* Bulli Abbayi of Korlapativaripalam ... *Appellant** (*Plaintiff*)

v.

Medida Ramanna and others...*Respondents* (*Defendants*).

Transfer of Property Act, S. 52—Suit on mortgage—Sale of the properties for arrears of Abkari dues pending the suit—Purchaser at sale not redeeming the mortgage—Purchaser in execution of the mortgage decree—Rights of—Madras Abkari Act, S. 28.

Where there was a mortgage suit pending and pending the mortgage suit the Revenue authorities brought the properties to sale for arrears of Abkari dues, they cannot, by such a sale, give a higher title to the purchaser at such sale than the owner of the land himself could have given if he had alienated the properties privately; for abkari dues are not the first charge on the property as arrears of land revenue. Consequently the doctrine of *lis pendens* applies to such a sale and if the purchaser does not get himself impleaded as a party to the mortgage suit and redeem the mortgage, he is not entitled to redeem it after the properties have been sold in execution of the mortgage decree and purchased by a third person. *Sarangapani* v. *The Secretary of State for India in Council,* (1893) I L R 16 M 479: 3 M L J 47 not followed. *Ragho Prasad* v. *Mewa Lal,* (1912) I L R 34 A 223: 22 M L J 457 (P C)

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*S. A. No. 1525 of 1923. 5th May, 1926.

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and *Mohidin Marakkayar* v. *Muthukrishna Aiyar*, (1902) I L R 26 M 230: 12 M L J 368 referred to

Second Appeal against the decree of the Court of the Subordinate Judge of Rajahmundry in A. S. No. 149 of 1922 (A. S. No. 122 of 1922, District Court, Godavari) preferred against the decree of the Court of the District Munsif of Amalapuram in O. S. No. 576 of 1920.

N. Rama Rao and *P. V. Rangaram* for appellant.

K. Ramamurthi for respondents.

The Court delivered the following

JUDGMENT :—The only point in this second appeal is, is the plaintiff entitled to redeem the suit property ? In order to understand the contention a few facts are necessary. The 2nd defendant was an abkari contractor and defaulted to pay the amount due to Government. A demand notice was served on him on 27th May, 1917 followed by a sale notice on 3rd July, 1917 and the sale of the suit property by the Revenue authorities was held on 10th August, 1917 and was purchased by the plaintiff. The suit property was at the time of the sale under a mortgage in favour of the 3rd defendant. He filed a suit on 13th July, 1917, obtained a mortgage decree and brought the mortgage property to sale on 4th March, 1919. The property was purchased by the 1st defendant herein. There were criminal proceedings between the plaintiff and the defendants, and the plaintiff has brought this suit for possession of the suit property on the ground that he is entitled to it and in the alternative he prays for redemption of the mortgage in favour of the 3rd defendant. The 1st defendant got possession of the property on 13th July, 1919 and the present suit was filed on 10th July, 1920.

The contention of Mr. Rangaram for the appellant is that the sale for arrears of abkari rent or kist was by the Government and therefore he is entitled to the plaint property, and if that contention is not good he prays that he may be given a decree for the redemption of the mortgage in favour of the 3rd defendant. The property having been sold in execution of the mortgage decree, and purchased by a third person, the question is whether the person who purchased the mortgage property pending the mortgage suit is entitled to redeem the mortgage after the mortgage has been merged in the decree and the property was purchased by a third person. The argument is that inasmuch as the Government attached the suit property for arrears of abkari rent, effect

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must be given to the attachment, and the sale by Government after the attachment must convey some title to the purchaser; in other words, a purchaser under such circumstances stands on a much higher footing than a private purchaser. It is contended that if the 2nd defendant had sold the property to a private purchaser pending the mortgage suit, the purchaser would not get a higher title than the mortgagor himself. But such a purchaser would be entitled to come in and ask to be made a party to the mortgage suit so as to enable him to redeem the mortgage. After the mortgage decree was passed and the property was brought to sale in execution of the mortgage decree and purchased by a third person, can such private purchaser from the mortgagor be held entitled to redeem the mortgage on the ground that he had acquired title prior to the date of sale in execution of the mortgage decree. I do not think that anybody could contend that a private purchaser under such circumstances would be entitled to redeem the property in the hands of the auction purchaser.

Reliance is placed by Mr. Rangaram upon *Sarangapani* v. *The Secretary of State for India in Council* (1) as supporting his contention. In that case certain land was put under attachment for arrears of revenue under the Madras Abkari Act, S. 28. The same land was subsequently attached in execution of a money decree against the defaulter and the defendant purchased it at the Court sale. The Collector objected to the sale of the land in question, but his objection was rejected. A suit was brought in the name of the Secretary of State for a declaration that the land was liable for the arrears of revenue in respect of which the attachment under the Abkari Act was made. A Bench of this Court held that the plaintiff was entitled to the declaration asked for. In support of the decision reliance was placed upon *Subramanya* v. *Rajaram* (2). With due respect to the learned Judges I am unable to see how the case in *Subramanya* v. *Rajaram* (2) applied to the facts of the case in *Sarangapani* v. *The Secretary of State for India in Council* (1). What the learned Judges say is that the interest acquired by the auction purchaser in execution of the money decree was subject to the liability which had been legally imposed in due course of law and the purchaser could take no more. The attachment for arrears of abkari dues does not create any interest in the property. The attachment does not create a charge,

1. (1893) I L R 16 M 479: 3 M L J 47. 2. (1885) I L R 8 M 573.

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and it is difficult to see what other rights it could create. If it does not create a charge, how could it affect the sale subsequently held in execution of a money decree by the Civil Court. The case in *Subramanya* v. *Rajaram* (2) instead of supporting the principle of the decision in *Sarangapani* v. *The Secretary of State for India in Council* (1) seems to be directly against it. In that case the interest of a tenant in a certain land was attached by his creditor in execution of a money decree. The landlord attached the same land for arrears of rent and brought it to sale and purchased it under the provisions of the Rent Recovery Act. The creditor subsequently purchased the interest of the tenant which was sold in execution of the decree. It was held by Muthuswami Aiyar and Parker, JJ. that the landlord's purchase was subject to the creditor's attachment. They observed at page 575 :—

> "It follows then that the landlord could only sell the tenant's interest, such as it was at the date of his attachment and sale, and that his power under S. 38 is nothing more than the power which an execution-creditor ordinarily has over his debtor's property............................In the view which we take of the landlord's power under S. 38 of Act VIII of 1865, he could only stand in the place of the tenant, and bring to sale for arrears of rent such interest as the tenant had power to sell at the date of the attachment and sale. This interest the tenant had no power to alienate to the prejudice of any claim enforceable under the attachment, and the landlord could not do more."

In the present case, there was a mortgage suit pending, and pending the mortgage suit the Revenue authorities brought the properties to sale for arrears of abkari dues. Could the Collector by such a sale give a higher title to the purchaser at the sale than the owner of the land himself could have given if he had alienated the property privately ? The contention that the Collector or the Government could give a higher title to a purchaser under such circumstances is on the face of it untenable. The Collector or the Revenue authorities in such a case act only as the owner of the land himself could act. No doubt the case will be different if it was a revenue sale for arrears of land revenue, for under the Revenue Recovery Act land revenue is the first charge on the property and any sale for arrears of land revenue would convey good title to the purchaser free of all encumbrances on the land. But a sale for realising the abkari dues, or forest dues, or other dues than the land revenue would not give such a right to the purchaser as the sale for arrears of revenue. The authority of

1. (1893) I L R 16 M 479 : 3 M L J 47. 2. (1885) I L R 8 M 573.

Sarangapani v. *The Secretary of State for India in Council* (1) cannot be accepted as good law in view of the decision of the Privy Council in *Ragho Prasad* v. *Mewa Lal* (3). There, there was a sale by the Collector under the Civil Procedure Code for the amount due in respect of Court-fees payable by the plaintiff on a suit *in forma pauperis*. The Privy Council held that the purchaser under such a sale got no title which would prevail against the purchaser in a suit which was pending at the time the Collector brought the property to sale. Lord Macnaghten, in delivering the judgment of their Lordships, observed :—

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"The Crown has no more right than a 'common person' to seize A's property and apply it in or towards the discharge of a debt due from B. That is not a question of law. It is a matter of common justice, and it may be added, of common honesty."

Reference may also be made to *Kadir Mohideen Marakkayar* v. *Muthukrishna Aiyar* (4) in this connection. In that case the share of a co-parcener was sold for arrears of income-tax. It was held that the share of the co-parcener was bound by the decree in the mortgage suit, notwithstanding such co-parcener was not joined in the suit as one of the legal representatives of the mortgagor. The learned Judges observe at page 236 :—

"If the second defendant had been a purchaser at a revenue sale for arrears of land revenue which accrued due in respect of the land purchased by him, the case would be quite different and the doctrine of *lis pendens* would not apply; for in that case the revenue sale would be in enforcement of a right of the Crown paramount to the mortgage right sought to be enforced by the decree of the Civil Court, and not simply of the right, title and interest of the defaulter as in the case of a sale for arrears of income-tax."

In this case the sale was during the pendency of the mortgage suit and as such cannot avail against the 1st defendant who purchased the property in execution of the mortgage decree. The doctrine of *lis pendens* applies to this case, and I therefore hold that the plaintiff is not entitled to redeem the suit property.

In the result the appeal fails and is dismissed with costs.

N. S. *Appeal dismissed.*

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1. (1893) I L R 16 M 479 3 M L J 47.
3 (1912) I L R 34 A 223: 22 M L J 457 (P C).
4. (1902) I L R 26 M 230: 12 M L J 368.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE PHILLIPS AND MR. JUSTICE MADHAVAN NAIR.

M. Krishna Pattar ... *Appellant** (*Petitioner*)

v.

K. Seetharama Pattar ... *Respondent* (*Counter-petitioner*)

Krishna Pattar *v.* Seetharama Pattar.

Limitation Act, Art 182 (5)—"Step-in-aid of execution"—Statement of objections that judgment-debtor's petition to record satisfaction of the decree should be dismissed—Pending execution application—Necessity of.

A statement filed by the decree-holder that the judgment-debtor's petition to record satisfaction of the decree should be dismissed is not a "step-in-aid of execution" within the meaning of Art. 182 (5) of the Limitation Act, as the decree-holder by filing the statement does not ask the Court to take any step-in-aid of execution

An application to be a step-in-aid of execution must be one in furtherance of execution proceedings *Kuppuswami Chettiar* v. *Rajagopala Aiyar;* (1921) I L R 45 M 466 42 M L J 503 followed.

Quaere: Whether an application to be a step-in-aid of execution should be one made in pending execution application?

Under Art 182 (5), the date from which the period of limitation must be computed is the date of applying to the Court asking it to take some step-in-aid of execution, and not the date of the petitioner's taking some step-in-aid of execution.

Case-law on the subject discussed.

Appeal against the appellate judgment of the Court of the Subordinate Judge of South Malabar at Calicut in A. S. No. 38 of 1923 preferred against the order of the Court of the District Munsif of Alatur, in E A.No.749 of 1922 in O.S.No.226 of 1916.

K. P. Ramakrishna Aiyar for appellant.

K. R. Narayana Aiyar for respondent.

The Court delivered the following

JUDGMENT :—This is an appeal against an order of the Subordinate Judge of South Malabar at Calicut who, reversing the order of the District Munsif, held that the decree-holder appellant's application to transfer the decree in O.S.No.226 of 1916 from the Alatur District Munsif's Court to the District Munsif's Court of Vaiyitri for execution was barred by limitation. A prior petition for execution, E. P. No. 458 of 1919, had been presented on the 4th of July, 1918. In the course of that petition an application was put in by the judg-

*A A A O No. 120 of 1925. 11th March, 1926.

Krishna Pattar v. Seetharama Pattar.

ment-debtor to record satisfaction of the decree on the 1st of August, 1919. A statement was then filed by the appellant on the 18th of August, 1919 praying that the judgment-debtor's petition to record satisfaction of the decree should be dismissed. The present application for transfer was made on the 26th of August, 1922. If time is calculated from the date of E. P. No. 458 of 1919, it is admitted that the present application is barred by time; but it was contended before the Subordinate Judge that the written statement of objections filed on the 18th of August, 1919 should be taken as "a step-in-aid of execution" under Art. 182 (5) of the Limitation Act and that if time is calculated from the date the present application is not barred. In *Kuppuswami Chettiar* v. *Rajagopala Aiyar* (1) it was held that a statement filed by a decree-holder objecting to the judgment-debtor's application to enter up satisfaction of the decree is not a step-in-aid of execution. Relying on that decision the learned Subordinate Judge overruled the appellant's contention and dismissed his petition.

The same contention has again been pressed before us; and the learned Vakil for the appellant has tried to distinguish the case in *Kuppuswami Chettiar* v. *Rajagopala Aiyar* (1) on the ground that there was no pending execution application in that case, arguing from this fact that if there was a pending application in that case the learned Judges would have arrived at a different conclusion. He has also argued on the authority of various decisions that a statement of objections filed by the decree-holder in circumstances like the present should be held to be a step-in-aid of execution under Art. 182 (5) of the Limitation Act.

The facts of the case in *Kuppuswami Chettiar* v. *Rajagopala Aiyar* (1) were as follows :—

"The decree was dated the 2nd May, 1916 and the only prior execution petition presented by the appellant-decree-holder was dismissed on the 7th of September, 1916. Admittedly the execution petition out of which the appeal arose was presented out of time, but it was said as in the present case that prior to the application for execution the judgment-debtor had put in a petition for entering up satisfaction of the decree and that in connection therewith the decree-holder had filed a counter-statement denying the receipt of money and praying that the petition should be dismissed. It was contended that the application to reject the petition to record satisfaction of the decree was a step-in-aid of execution, but this contention was overruled. In the course of his judgment, Ayling, J. (who delivered the leading judgment) stated thus:—

1. (1921) I L R 45 M 466: 42 M L J 303.

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"The Art. 182 (5) classes together an application for execution and an application to take some step-in-aid of execution and the latter words appear to be intended to cover an application, which is not an initial application for execution, but is an application to take some step to advance an execution proceeding, which is already pending, *e. g.*, application to bring to sale properties already under attachment (p. 469)........But whatever case may be made out for an application made in connection with a pending execution petition as one for taking a step-in-aid or furtherance of it, an application made at a time when no execution petition is pending stands on an obviously different footing."

It is argued that two conclusions follow from these extracts : (1) that an application to be a step-in-aid of execution should be one made in pending execution application, and (2) that if there was a pending execution application in that case as in the one before us, then the learned Judges would have certainly held that the statement of objections filed by the decree-holder to the recording of satisfaction would be a step-in-aid of execution. As regards the first conclusion sought to be deduced from the judgment, no doubt the decision in *Balaguruswami Naicken* v. *Guruswami Naicken* (2) supports the appellant's contention; but it is not necessary to discuss the correctness of that conclusion in this case as admittedly here there is a pending execution application. If we really had to decide the question we should hesitate to accept this decision without further consideration of the matter in the light of all the decided cases of our Court which have not been referred to in *Kuppuswami Chettiar* v. *Rajagopala Aiyar* (1). It seems to us that the remarks referred to were made by the learned Judge only to distinguish those cases, wherein questions of a similar nature arose in connection with pending execution applications. As regards the second conclusion sought to be deduced from that judgment, we have no doubt that the appellant's contention cannot be accepted because the learned Judge's decision is based upon an interpretation of the decree-holder's objection petition in view of what he considers should be the meaning of the expression "applying to take some step-in-aid of execution," for, the learned Judges state at p. 470:

"The petition, Ex. E, may tend to prevent the Court placing an obstacle in the way of future execution of the decree, but it does not ask the Court to take any step-in-aid of execution. Supposing it to be successful; execution of the decree is no further advanced than it was before the petition was presented."

1. (1921) I L R 45 M 466: 42 M L J 303.
2. (1924) 48 M L J 506.

This shows that even if there was a pending execution application, the learned Judge would have come precisely to the same conclusion because in his view the decree-holder did not by filing his objection statement ask the Court to take any step-in-aid of execution. We respectfully accept this view.

According to the third column of Art. 182 (5) of the Limitation Act, time for execution is to be calculated from "the date of applying in accordance with law to the proper Court for execution, or to take some step-in-aid of execution of the decree or order".

The latter part of this clause specifies the date of applying to the Court asking it to take some step-in-aid of execution of the decree or order as the date from which the period of limitation should be computed and not the date of the petitioner's taking some step-in-aid of execution. If this distinction is well kept in mind, much of the diversity of the views among the various High Courts as regards the meaning of the expression "applying to take some step-in-aid of execution" can easily be explained. As pointed out by Oldfield, J., in *Rangachariar* v. *Subramania Chetti* (3)—

"It is material that the starting point under Art. 182, Sch. I of the Limitation Act is not the taking of a step-in-aid of execution, but the application to take such a step."

In the same judgment Seshagiri Aiyar, J. refers to the same matter thus :—

"Two things are essential. There must be an application and that application must ask the Court to take a step-in-aid of execution.........The fact that a party took some steps would not be enough."

The distinction we are referring to is nowhere better pointed out than in *Raghunundun Misser* v. *Kallydut Misser* (4). In that case the learned Judges were considering whether an application by a decree-holder for leave to bid at a sale in execution of the decree is a step-in-aid of execution within the meaning of the Limitation Act (XV of 1877), Sch. II, Art. 179 (corresponding to Art. 182 of the present Limitation Act). In coming to the conclusion that it is not such a step the learned Judges state :—

"We do not think an application of this kind is an application seeking the action of the Court in execution of a decree. It may be in one sense a step-in-aid of execution of the decree, but it is not a step by the Court. Before a judgment-debtor can get any benefit he must show that he asks the Court to take some step-in-aid of execution. A step taken by the judgment-creditor himself is not sufficient."

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3. (1920) 12 L W 9 at 10. 4. (1896) I L R 23 C 690 at 692.

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This case has been followed in *Kuppuswami Chettiar* v. *Rajagopala Aiyar* (1). If this distinction is borne in mind, it is obvious that a statement of objections filed by the decree-holder objecting to the recording of satisfaction cannot in any way be considered to be a step-in-aid of execution. By filing the statement the decree-holder does not ask the Court to take any step-in-aid of execution. In the words of Ayling, J. in *Kuppuswami Chettiar* v. *Rajagopala Aiyar* (1) "supposing it to be successful, execution of the decree is no further advanced than it was before the petition was presented". We will now discuss the cases referred to by the learned vakils on both sides.

In *Kewal Ram* v. *Khadim Hussain* (5) it was held that—

> "An application by a decree-holder praying that the objections taken by the judgment-debtor to the sale of property belonging to him in execution of the decree should be disallowed and the sale be confirmed is an application from the date of which the period of limitation for a subsequent application for execution of the decree may be computed"

This judgment simply records this opinion and does not contain any discussion of the question. It is conceded that the decision in *Kuppuswami Chettiar* v. *Rajagopala Aiyar* (1) is opposed to this view. This decision was followed by the Allahabad High Court in *Shugan Chand* v. *Ramjas* (6). In *Tamiz-un-nissa Bibi* v. *Najju Khan* (7), brought to our notice, it was held that an application to the Court executing a decree asking that certain objections to the execution of the decree be rejected is a step-in-aid of execution within the meaning of Art. 182 (5) of the First Schedule of the Limitation Act. Here also the judgment does not contain any discussion of the question. In *Langtu Pande* v. *Baijnath Saran Pande* (8) it was held that the mere filing of an answer by the decree-holder resisting an application of a declaration of insolvency filed by the judgment-debtor cannot be deemed to be an application to take a step-in-aid of execution within the meaning of Art. 179. This view is opposed to the earlier and later decisions of the same Court.

In *Umesh Chunder Dutta* v. *Soonder Narain Deo* (9) it was held that the appearance of a decree-holder by his pleader to oppose an application made by the judgment-debtor

1. (1921) I L R 45 M 466: at 470: 42 M L J 303.
5. (1883) I L R 5 A 576
6. (1910) 5 I C 292
7. (1918) I L R 40 A 668.
8. (1906) I L R 28 A 387.
9. (1889) I L R 16 C 747.

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to set aside a sale in execution of the decree is not an application within the meaning of Art. 179 of Sch. II of the Limitation Act to take a step-in-aid of execution. The learned Judges stated that—

"The application contemplated by that article of the Limitation Act is an application to get some order of the Court in furtherance of the execution of the decree. The appearance of the pleader cannot be regarded as such an application."

The decisions in *Raghunandan Pershad* v. *Bhugoo Lall* (10) and *Raghunudun Misser* v. *Kallydut Misser* (4) also take a similar view of Art. 179, Sch. II of the Limitation Act. These cases have been followed in *Kuppuswami Chettiar* v. *Rajagopala Aiyar* (1) as regards the interpretation of the article in question [see also *Troylokya Nath Bose* v. *Jyoti Prakash Nandi* (11),]. On the facts, the decision in *Gobind Pershad* v. *Rung Lal* (12) can be distinguished. In that case it was held that an application by a decree-holder, praying that a petition of the judgment-debtor to set aside the sale of property belonging to him should be rejected and the sale be confirmed is an application falling within the meaning of Art. 179 (4) of Sch. II of the Limitation Act of 1877. The facts of the case show that after the sale was confirmed the judgment-debtor applied for a review of the order confirming the sale and the review was granted in spite of the objections of the decree-holder who appeared and opposed it. Subsequently the decree-holder put in an application praying that the judgment-debtor's application to set aside the sale might be rejected at the same time applying for confirmation of the sale. In view of the "review order" that was passed against the decree-holder, we are inclined to think that the decree-holder's application was in furtherance of execution proceedings. The decision in *Kedar Nath Dey Roy* v. *Lakhi Kanta Dey* (13) is also distinguishable. In that case the judgment-debtor raised objections to the delivery of possession by the Commissioner and the Court found it necessary to determine the standard of measurement and for that purpose to take evidence in the matter. An application was then made by the decree-holder for summoning witnesses. It was held that this was a step-in-aid of execution within the meaning of Art. 182 (5). It is clear from the facts that in the opinion of the Court execution could not proceed without determining

1. (1921) I L R 45 M 466: 42 M L J 303.
4. (1896) I L R 23 C 690.
10. (1889) I L R 17 C 268.
11. (1903) I L R 30 C 761.
12. (1893) I L R 21 C 23.
13. (1917) 40 I C 1005.

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the standard of measurement. In this view the application to file a list of witnesses may be deemed to be a step-in-aid of execution. The learned Judges in arriving at this conclusion follow the prior decisions of their Court already referred to. In *Brojendra Kishore* v. *Dil Muhmud Sarkar* (14), when the decree-holder applied for execution of his decree the judgment-debtor put in an objection to its execution. Both the parties having been directed by the Court to adduce evidence in support of their respective cases, the decree-holder filed a list of witnesses and intimated to the Court that he was ready to proceed with his case. The Court held that the filing of the list of witnesses and intimating to the Court that he was ready to proceed with the case implied an application on the part of the decree-holder to the Court to take the evidence which he was prepared to adduce and repel the objection taken by the judgment-debtor and in effect this should be taken to be an application to the Court, to take some step-in-aid of execution. This decision to some extent supports the appellant. Excepting this decision the Calcutta High Court has taken a view consistently opposed to the contentions of the appellant.

The Bombay cases relied upon by the appellant need not be discussed in detail. The latest decision of that Court is reported in *Lakshmiram Lallubhai* v. *Balashankar Venirram* (15) in which it was held that an appeal against an order adjudging the judgment-debtor an insolvent was a step-in-aid of execution. This has been expressly dissented from in *Kuppuswami Chettiar* v. *Rajagopala Aiyar* (1). In *Seshadasacharya* v. *Bhimacharya* (16) an application filed by the decree-holder for extension of time to produce an extract from the Collector's record ordered by the Court to be filed within a particular date but which was not so filed was held to be a step-in-aid of execution. With all deference to the learned Judges, we cannot accept this conclusion or the reasoning on which it is based.

Thus far, we have discussed the decisions of the other Courts brought to our notice. Our own High Court has always held the position that an application to be a step-in-aid of execution must be one in furtherance of execution proceedings. We have already indicated the interpretation put upon the

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1. (1921) I L R 45 M 466 at 471: 42 M L J 303.

3. (1920) 12 L W 9. 14. (1918) 44 I C 604.

15. (1914) I L R 39 B 20 16. (1912) I L R 37 B 317.

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article by the learned Judges in *Rangachariar* v. *Subramania Chetti* (3). Having reference to the facts of the case, the decision in *Kunhi* v. *Seshagiri* (17) does not really help the appellant. In that case it was held that an application by a judgment-debtor to the Court which passed a decree for a certificate that a copy of the Revenue register of the land is necessary to enable him to obtain such a copy from the Collector's Office and thereupon to execute the decree by attaching the land, is a step-in-aid of execution within the meaning of Art. 179 (4). Innes, J., pointed out that "the production of the copy of the register was a necessary preliminary to execution and the application made by the decree-holder to the Subordinate Judge's Court would enable him to obtain it." In this view the application was one in furtherance of execution proceedings and was a step-in-aid of execution. The decision in *Abdul Kader Rowther* v. *Krishnan Malaval Nair* (18) no doubt supports the appellant. There it was held that an application by a decree-holder for an adjournment to enable him to adduce further evidence was a step-in-aid of execution. We may point out that Ayling, J., in *Masilamani Mudaliar* v. *Sethusami Aiyar* (19) found it impossible to concur with this view. The latest decision of our own Court is the one in *Balaguruswami Naicken* v. *Guruswami Naicken* (2) already referred to in another connection. The facts of the case are as follows :—A mortgage decree in favour of the plaintiffs was passed on the 14th of September, 1916, and an execution application was filed on the 25th of September, 1917. It was dismissed on the 17th of October, 1918. The application that gave rise to the appeal was dated the 9th of March, 1923. A certain sum of money in Court was paid to the decree-holder by order, dated the 31st of March, 1920, and a cheque was actually issued on the 1st of April, 1920. The money in Court had been paid by a mortgagee of the joint-debtor who had been directed to pay off the decree amount. The decree-holder relied to save his application from the bar of limitation on the date of the order for payment to him of the money in Court." The learned Judges held that the application of the decree-holder is not a step-in-aid of execution. They base their decision on two grounds,

1. (1921) I L R 45 M 466: 42 M L J 303.
2. (1924) 48 M L J 506. 3. (1920) 12 L W 9.
17. (1882) I L R 5 M 141.
18. (1913) I L R 38 M 695: 26 M L J 433.
19. (1917) I L R 41 M 251: 33 M L J 219.

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(1) that in the circumstances of the case an application for an order for payment out by the Court is not a step-in-aid of execution, and (2) that as there was no pending execution application the order relied upon could not be considered to be a step-in-aid of execution. As regards the latter ground, we have already expressed our opinion. It is not necessary to discuss the first ground either as the decision, if correct, certainly supports the view that the application we have got to deal with in the present case is not a step-in-aid of the execution. If we hold that the application in that case amounts to a step-in-aid of execution our opinion cannot help the appellant because as we have already pointed out his objection application cannot in any sense be deemed to be one in furtherance of execution proceedings.

The cases examined above show that there has been much diversity of opinion as regards the interpretation of the expression "applying to take some step-in-aid of execution." In our opinion, the decision in *Kuppuswami Chettiar* v. *Rajagopala Aiyar* (1) interprets that expression correctly, and the weight of authority is in support of that interpretation. That decision must govern the present case. In this view the filing of statement by the decree-holder in this case objecting to the judgment-debtor's application to record satisfaction of the decree is not a step-in-aid of execution and cannot therefore save his last application from being barred by limitation. We therefore dismiss this appeal with costs.

N.S. *Appeal dismissed.*

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1. (1921) I L R 45 M 466: at 470: 42 M L J 503.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE PHILLIPS AND MR. JUSTICE MADHAVAN NAIR.

Katifi Muhammad Hamidudin Saheb and others ... *Appellants** (*Petitioners —Plaintiffs* 1 *and* 2 *and* 4 *to* 8)

v.

Muhammad Ghouse Saheb and others ... *Respondents* (*Respondents —Defendants* 1, 4 *and* 6 *to* 8).

Hamidudin Saheb *v.* Ghouse Saheb.

Limitation Act, Art. 182 (5)—*"Step-in-aid of execution"—Decree-holder's request for extension of time to obtain the necessary papers and re-present the execution petition.*

Where an execution petition was returned by the Court for being re-presented with the sale papers and encumbrance certificate, and the petition was re-presented without the papers, but with a request inscribed in the petition for extension of time by two weeks for obtaining the necessary papers,

Held, that the request for extension of time cannot be deemed to be an "application for a step-in-aid of execution" within the meaning of Art. 182 (5) of the Limitation Act.

Kuppuswami Chettiar v. *Rajagopala Aiyar,* (1921) I L R 45 M 466 applied.

Appeal against the appellate order of the District Court of South Arcot in A.S.No.197 of 1922 preferred against the order of the Court of the District Munsif of Chidambaram in E.P.R.No.707 of 1921 in O. S. No. 176 of 1912.

A. Viswanatha Aiyar for appellants.

M. Patanjali Sastri for respondents.

The Court delivered the following

JUDGMENT :—This Civil Miscellaneous Second Appeal also raises a question of limitation similar to the one dealt with in the judgment [in C. M. S. A. No. 120 of 1923 (1).] just now pronounced. The appeal was also heard along with the last one. The decree-holders are the appellants. The execution petition out of which the appeal arises was presented on 21st October, 1921. The previous execution petition presented on 28th September, 1918 was returned by the Court for being re-presented with the sale papers and encumbrance certificate, the time allowed for re-presentation being 3 weeks from 30th September, 1918. The petition was re-presented on 21st October, 1918 without the necessary papers called for but with a request inscribed in the petition for extension of time by two weeks for obtaining the necessary papers. Though the request was granted the execution petition was not re-pre-

*A A A O No. 134 of 1925. 11th March, 1926.

1. *Krishna Pattar* v. *Sitharama Pattar,* (1926) 51 M L J 480.

Hamidudin Saheb v. Muhammad Ghouse Saheb.

sented afterwards. It has, however, been filed in Court along with the execution petition which has given rise to this appeal.

Prima facie the present petition is barred by limitation, but the appellants contend that it is not time-barred because it was filed within three years of the re-presentation of the former petition with a request for the enlargement of time and that this request amounts to an application for a step-in-aid of execution. It is conceded that the case falls within the scope of the ruling in *Kuppusami Chettiar* v. *Rajagopala Aiyar* (1) discussed in the prior case. On the reasoning of our judgment in that case it must be held that the decree-holders' request for the extension of time for filing the necessary papers cannot be deemed to be an application for a step-in-aid of execution. The learned vakil for the appellants has quoted a few more cases in addition to those already referred to, those being *Vishvanath Parsharam Bhave* v. *Narsu Tulsidas Gujar* (2) and *Raghunath Prasad Singh* v. *Lachhmi Narain Singh* (3). In view of what we have already stated regarding the decisions of the Bombay and Allahabad High Courts, it is unnecessary to discuss these cases any further.

On the merits a special plea has been put forward to the effect that we should treat the petition re-presented on 21st October, 1918 as a fresh petition for execution. This clearly cannot be done; neither can we accept the contention that the date of re-presentation with a request for time should be treated as the date on which the application for execution was presented.

This appeal also must be dismissed with costs.

N. S. *Appeal dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE ODGERS AND MR. JUSTICE MADHAVAN NAIR.

Muthu Balu Chetti ... *Accused* in S.C. No.* 975 *of* 1924 *on the file of the* 1*st Class Bench of Magistrates, Madura Town.*

Muthu Balu Chetti, *In re.*

Madras District Municipalities Act (V of 1920), *Ss.* 249 *and* 250—*Permission obtained under S.* 250—*Necessity for taking out licence under S.* 249.

*Cr. R. C Nos. 377 to 404 of 1926. 20th August, 1926.

1. (1921) I L R 45 M 466: 42 M L J 303.

2. (1920) 23 Bom L R 107. 3. (1925) I L R 47 A 667.

The fact that permission was obtained under S. 250 of the Madras District Municipalities Act for the installation of a rice mill and engine does not absolve the owner of the mill from taking out licences for working the engine under S. 249. The object and scope of Ss. 249 and 250 are entirely different. S. 249 contemplates an annual payment for the use of the machinery, while S. 250 a payment once for all for installing it. *Madura Municipality* v. *Muthu Balu Chetty,* (1926) 50 M L J 384 dissented from. *In re Smith,* (1925) 45 M L J 731 referred to.

Muthu Balu Chetti, *In re*

Case referred for the orders of the High Court under S. 438 of the Criminal Procedure Code by the Sessions Judge of Madura in his letter No. 4558 dated the 25th day of February, 1926 in Cr.R.P.Nos.49 to 76 of 1925 on his file.

F. S. Vaz on behalf of the Madura Municipality.

S. T. Srinivasagopalachariar for accused.

The Public Prosecutor on behalf of the Crown.

The Court made the following

Odgers, J.

ORDER :—*Odgers, J.* :—This batch of Criminal Revision cases has been referred by the Sessions Judge of Madura. The First Class Bench of Magistrates, Madura Town, convicted the persons concerned under S. 338 of the District Municipalities Act on the ground that they had not taken out licences under S. 249 of the same Act. Permission had been obtained under S. 250 and it was contended before the Bench of Magistrates and before us in revision that if such permission is obtained it is unnecessary to take out a licence under S. 249. Reliance is placed on the ruling of a Bench of this Court in Cr. R. C. No. 503 of 1925* and the learned Sessions Judge has referred the matter to this Court on the ground that the convictions are illegal having regard to that ruling. The Magistrates found as a fact that the working of the rice mills in question is likely to be dangerous to human life or health or property and would therefore fall within the mischief of Sch. V, cl. (*q*) of the Act. So we must take it that the persons concerned have been found to be doing in the course of an industrial process something which is likely to be dangerous to human life or health or property.

The sole question is whether permission obtained under S. 250 absolves the persons concerned from taking out licences under S. 249. This portion of the Act beginning at S. 249 is headed "Industries and Factories" and S. 249 deals with "Industries" and S. 250 with the construction or establishment of factories, workshops or work-places in which it *is proposed* to employ steam power, water power or other mecha-

**Madura Municipality* v. *Muthu Balu Chetty,* (1926) 50 M L J 384.

Muthu Balu Chetti, *In re.*

Odgers, J.

nical or electrical power or with the installation of any machinery or manufacturing plant driven by steam, water or other power as aforesaid. The person intended to construct a factory or instal machinery must, before beginning such construction, establishment or installation, apply to the Municipal Council for permission to undertake the work. This section says nothing about the kind of trade or industry to be carried on in the factory or on the premises in which machinery, etc., is to be installed and in my opinion the proviso in 3 (*a*) of the section is not intended to apply to matters of this kind. The permission is to construct or establish a factory or to instal machinery. S. 249 deals with a wholly different state of things. It gives the Council power to notify that all or some of the trades or industries enumerated in Sch. V may not be carried on within Municipal limits or at a distance of three miles outside without the Chairman's licence. They are all noxious or more or less objectionable trades or occupations. Many of them may be carried on without the establishment of a factory or workshop or the installation of any machinery. In the case referred to (Cr. R. C. No. 503 of 1925*) Devadoss and Waller, JJ., recognise the distinction pointed out above in the Act between industries and factories. But they seem to have been impressed by the fact that the Council was to grant the permission under S. 250 whereas the Chairman is to grant the licence under S. 249. I cannot with deference see the anomaly. The Council regulates the construction or user of buildings within the Municipality as factories, the Chairman in the first instance regulates their working if it is desired to carry on one or more of the scheduled occupations or trades therein. There is always an appeal to the Council from the decision of the Chairman. But much or most of the discussion in the judgment turns on the construction of cl. (*q*) of Sch. V as to which as observed we must accept the finding of fact by the Bench.

There are two decisions of Krishnan, J., both reported in 45 M. L. J. The first at p. 555 *In re Ramachandra Rao* (1) is referred to by the learned Judges in the case under discussion. That case deals with the construction of cl. (*q*) of Sch. V. The other case at page 731 *In re Smith* (2) was not referred to by the learned Judges. In it Krishnan, J., was dealing with Ss. 287 and 288 of the Madras Act IV of 1919 which are

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1. (1923) 45 M L J 555. 2. (1923) 45 M L J 731.

Muthu Balu Chetti, *In re.*

Odgers, J.

closely analogous to the sections now under review, and the learned Judge was of opinion that the licence for the use of machinery and the payment once for all for erecting machinery are different things, and the fact that payment was made in the one case is no excuse for not paying in the other. With this opinion I respectfully agree, and on the above considerations I am unable, I regret, to concur with the ruling of the Bench in Cr. R. C. No. 503 of 1925*. I must hold therefore that the convictions in these cases were right. I would return all these revision petitions to the District Judge to be dealt with in the light of the foregoing remarks.

Madhavan Nair, J.

Madhavan Nair, J. :—The facts of this reference are not much in dispute. The accused keeps within the Municipal limits of Madura Town a rice mill for converting paddy into rice and for this purpose he used a rice-hulling machine which is worked by a 20 horse-power oil engine. He has been convicted by the Court of the 1st Class Bench of Magistrates, Madura Town, under Ss. 249 and 338 of the District Municipalities Act for having failed to take out a licence for using the engine to work the machine. The main argument advanced on his behalf is that, having obtained permission under S. 250 of the Act for the installations of the rice-mill and the engine, he is not required to take out any further licence for working the engine under S. 249. This argument is supported by a decision of this Court in Cr. R. C. No. 503 of 1925*. Mr. Adam argues that this case has been wrongly decided by the learned Judges.

It may be stated at the very outset that we have been asked by the learned Public Prosecutor to consider this reference on the assumption that the machinery in question falls within Sch. V, cl. (*q*) of the District Municipalities Act. The District Judge has not expressly stated so in his letter of reference; but the Magistrates who have convicted the accused have held that the working of this machinery is dangerous to human life, health or property as mentioned in cl. (*q*) of the schedule.

S. 249 of the District Municipalities Act states that no place within the Municipal limits shall be used for any one or more of the purposes specified in Sch. V without the Chairman's licence. Under this section it is obligatory on any one using a place for working machinery of the description specified in Sch. V to obtain a licence. The licence granted under the section shall enure for a year. It is obvious that the

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object of the section is to make the licensee pay an annual fee for using machinery of the kind described in cl. (*q*) of Sch. V in his premises. S. 250 of the same Act states that every person intending to construct or establish any factory.......in which it is proposed to employ steam-power..... or to instal in any premises any machinery.......driven by......steam, water ....shall before beginning such construction or installation obtain a licence from the Municipal Council [cls. (*a*) and (*b*)]. This section contemplates the levy of a fee before a factory is established or special kind of machinery is installed. The payment is a payment once for all and not annual, as in cases falling under S. 249. The object and scope of the two sections are thus, in my opinion, entirely different. The one contemplates an annual payment for the use of the machinery, while the other a payment once for all for installing it. The argument advanced by Mr. Srinivasagopalachari, if accepted, would lead to this position, viz., that once permission is granted for installing the machinery, the applicant can work the machinery for ever without making any payment at all. This can hardly have been the intention of the legislature in enacting Ss. 249 and 250 of the District Municipalities Act. In the judgment already referred to, it is stated that

"It would be completely anomalous to hold that, after the Council had granted permission for the erection of a mechanical power factory, it is open to the Chairman to refuse a licence for its being worked or to impose impracticable conditions on its working."

With great respect to the learned Judges, I cannot see any anomaly in the situation if the scope and object of the two sections are correctly appreciated. In my opinion, the fact that the industries included in S. 249 and Sch. V are licensed by the Chairman, subject to the control of the Council, while the power factories referred to in S. 250 are regulated by the Council itself, subject to the orders of the Governor in Council, has no material bearing on the question under consideration.

Ss. 287 and 288 of the City Municipal Act may be referred to with advantage in this connection. S. 287 states that

"The owner or occupier of every place used for any purpose specified in Sch. VI shall, in the first month of every year, or in the case of a place to be newly opened, before it is opened, apply to the Commissioner for a licence for the use of such place for such purpose."

S. 288 states that

"No person shall, without the permission of the Commissioner, erect anywhere any steam-boiler or machinery by the use of which smoke, smell, noise,

vibration, dust or floating particles of combustible or other matter are produced or danger is likely to arise to the inhabitants of the neighbourhood."

In *In re Smith* (2) Mr. Justice Krishnan had to consider the true scope of these two sections under slightly different circumstances. In that case, the accused was convicted for not taking a licence under S. 288. He had removed his machinery from its old place to a new one, and obtained permission to use it in his new premises, but he had not obtained permission to erect the machinery in the new place. It was argued as the first point that

"the accused having been allowed to use the machinery in Jone's Street and it having been merely transferred to the new place, he could not be asked to pay any new licence fee for erecting the machinery there."

The learned Judge in overruling this argument made the following observation:

"I do not agree with this contention because the two things are different, the one is an annual payment of the licence fee for the use of the machinery and the other is a payment once for all for erecting the machinery and the fact that payment was made in the one case is no excuse for not paying in the second case."

I think these observations may well be applied in considering the arguments advanced in the case before us.

For these reasons I would respectfully differ from the decision in Cr. R. C. No. 503 of 1925. The other question raised in that case, viz., whether the machinery falls within cl. (*q*) of Sch. V does not arise in the present case as already indicated. I would therefore return the reference and the connected cases to the District Judge and ask him to deal with the case in the light of the above observations.

N.S. *Reference answered.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE WALLACE AND MR. JUSTICE MADHAVAN NAIR.

Mayandi Thevan ... *Appellant* (Prisoner)*

Mayandi Thevan, *In re.*

Criminal Tribes Act (VI of 1924), S. 23—Second and third convictions whether should be convictions after the tribe was declared a criminal tribe—"Special reasons to the contrary"—What constitute.

For the application of S. 23 (1) (*b*) of the Criminal Tribes Act it is not necessary that both the second and third convictions should be convictions after the tribe to which the accused belongs had been declared a criminal tribe or after the accused was registered a member of the criminal tribe.

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*Crl. Appeal No. 203 of 1926 3rd September, 1926.
Cr. R. C. No. 513 of 1926.
(Taken up No. 16 of 1926.)

2. (1923) 45 M L J 731.

Mayandi Thevan, *In re.*

Reference No. 17 of 1924 not followed.

Criminal Appeals Nos. 318 and 367 of 1925 followed.

The mere fact that an offence is not of a very serious nature cannot form a special reason for reducing the sentence. Such special reasons must be something apart from the nature of the offence. such as youth or age or illness or sex.

Appeal against the order of the Court of the Assistant Sessions Judge of the Madura Division in Case No. 93 of the Calendar 1925.

The Public Prosecutor on behalf of the Crown.

The Court delivered the following

JUDGMENT :—The appellant in this case has been convicted on the unanimous verdict of a Jury of offences under Ss. 457 and 380, Indian Penal Code, and sentenced to rigorous imprisonment for 7 years. It was held that he broke into P.W. 1's house and stole a ram therefrom. There is no misdirection in the charge and none is urged in the appeal petition. The only question for consideration is the question of sentence.

The appellant is a member of a notified criminal tribe and has had two previous convictions, both subsequent to 1911. *Prima facie* therefore the sentence which ought to have been passed on him for a third conviction is under S. 23 of Act VI of 1924, transportation for life. Notice was served on him to show cause why the sentence imposed should not be enhanced. The Sessions Judge has given no reasons for not imposing the sentence of transportation for life.

In a judgment of this Bench in Reference No. 17 of 1924 we held that, when an accused person was a member of a criminal tribe but was not registered as such until 1923, his second and third convictions must be convictions after his registration, and not merely his second and third conviction "he being a member of a criminal tribe," since, if the latter view prevailed, S. 23 (1) (*b*) could be applied before 1 (*a*) had been applied. By the proviso all convictions prior to 1st March, 1911 count as one. If the second conviction may be a conviction *after* 1st March, 1911 but *before* the tribe is declared a criminal tribe, then at the time of the conviction S. 23 (1) (*a*) would not be applied ; but if the third conviction was *after* the tribe was declared a criminal tribe then, if mere membership of a criminal tribe operates to bring S. 23 into force for a third conviction, S. 23 (1) (*b*) must be applied although 1 (*a*) had not yet been applied. This seemed to us to indicate that what the section really meant was that both the second and third

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convictions should be after the tribe to which the accused belongs had been declared a criminal tribe or after the accused was registered a member of the criminal tribe. The correctness of this ruling was however doubted by a member of another Bench in Criminal Appeals Nos. 318 and 367 of 1925, Devadoss, J. holding with us and Waller, J., taking the other view. In this difference of opinion the matter was placed before a third Judge, the learned Chief Justice, who upheld the view of Waller, J., and pointed out that the statute did in words distinguish, when it intended to do so, between a member of a criminal tribe and a registered member of a criminal tribe—compare S. 23 with Ss. 22, 24 and 25. We think there is considerable force in this point though it does not wholly get over the difficulty that in certain cases S. 23 (1) (*b*) will apparently have to be applied before S. 23 (1) (*a*) has been applied. We are not prepared to press our previous view which was, we admit, partly induced by a reluctance to suppose that the legislature intended such an extreme severity as the Act would seem to imply.

We have called for the notification under which the tribe of this accused was notified as criminal. It is dated 5th June, 1918 and the accused was apparently registered on 14th July, 1920. The fact that he was a member of a criminal tribe seems to have been overlooked by the 1st Class Magistrate of Usalampatti who convicted him, his second conviction, on 20th December, 1923 and sentenced him to 18 months' rigorous imprisonment. He ought then to have sentenced him to an imprisonment of not less than 7 years. Now undoubtedly the only legal sentence which can be imposed on him is transportation for life, unless the Court is satisfied that there are special reasons for reducing the sentence. We cannot think that the mere fact that his offence is not of a very serious nature, that is to say, house-breaking and not robbery or dacoity, can form a special reason for reducing the sentence. Such special reasons must in our view be something apart from the nature of the offence, such as, youth or age or illness or sex. The Act clearly implies that on a third conviction of an offence under Sch. I the punishment to follow is transportation for life. We must therefore enhance the sentence on the accused to one of transportation for life.

At the same time we feel the sentence is unduly harsh and doubt if the framers of the Act really intended such a re-

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sult. It means, for instance, that for, say, 3 separate thefts of a goat, the 3 goats being worth perhaps Rs. 9 in all, at different times, a man may be sentenced to transportation for life. The result of enforcing such penalties must be, we feel sure, a crop of recommendations to Government to reduce the sentences and we would suggest that the better course would be to consider whether the extreme rigour of the Act may not be mitigated by fresh legislation. In the present case we intend to move the Government to reduce the sentence to rigorous imprisonment for 7 years which we think is an adequate sentence even for a member of a criminal tribe in the circumstances of this case, and we shall do so accordingly.

N.S. *Sentence enhanced to transportation for life.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE DEVADOSS AND MR. JUSTICE WALLER.

K. Munisamy Chetty ... *Petitioner* (Plaintiff-respondent)*

v.

K. Subbaroya Achari ... *Respondent (Defendant-appellant)*

Munisamy Chetty *v.* Subbaroya Achari.

Presidency Small Cause Courts Act (XV of 1882), S. 38—Reference to arbitration by a Judge of a Presidency Small Cause Court—Award—Decree modifying the award by going into the merits of the case—Application to Full Bench—Maintainability.

Where a Judge of a Presidency Small Cause Court referred a suit to arbitration and passed a decree not in terms of the award modifying the award by going into the merits of the case, an application to the Full Bench against that decree is maintainable.

Petition under S. 115, Civil Procedure Code, to revise the order of the Presidency Small Cause Court at Madras in F. B. A. No. 250 of 1923 in Suit No. 11230 of 1922.

S. T. Srinivasagopalachari and *A. Sundaram* for petitioner.

V. C. Seshachariar for respondent.

The Court delivered the following

JUDGMENT :—The only point urged in this Revision Petition is that no application to the Full Bench lay against the order of the trial Judge inasmuch as the decree passed by him was on an award. The matter in dispute between the parties was referred to arbitration and the arbitrator passed an award.

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*C R P No. 895 of 1924. 25th February, 1926

Munisamy Chetty v. Subbaroya Achari.

When it came up before the Judge who remitted the case to the arbitrator he held that the arbitrator did not consider certain facts and passed a decree modifying the award. Against his order an application to the Full Bench was made and the Full Bench held that the order of the Trial Judge modifying the award was wrong, and set aside his order and directed a decree to be passed in terms of the award. Mr. Srinivasagopalachariar's contention is that the decree of the Trial Judge was passed on the award and therefore under S. 38 no application to the Full Bench lay. If the decree was on the award or in terms of the award, no doubt his contention would be right, but the learned Trial Judge modified the award by going into the merits of the case and holding that the arbitrator did not consider certain facts and did not take into account certain payments made by the defendant. This we consider is a modification of the award and against such a modification an appeal lies in ordinary cases; in other words, a decree of this kind is not one which would come under S. 522 of the old Code or R. 16 of Sch. II of the present Code. If the Judge thought that the award was not in accordance with the reference to arbitration, or not in accordance with the directions given by him he should have remitted the award under R. 14 for reconsideration. Under R. 12, the Court may modify the award where it appears that the award is upon a matter not referred to arbitration, or where the award is imperfect, or where the award contains a clerical mistake or error. In this case two matters were referred to arbitration, one as regards dealings between the parties and the other as regards the partnership transactions. The arbitrator after taking evidence came to the conclusion that the claim in respect of the dealings was true and disallowed the claim as regards the partnership transactions. It cannot be said that the arbitrator acted outside the scope of the arbitration or omitted to consider any matter referred to him for arbitration. In these circumstances, we think the order of the Trial Judge was not one made under R. 12 of Sch. II and therefore an application to the Full Bench did lie under S. 38 of the Presidency Small Cause Courts Act. The Civil Revision Petition fails and is dismissed with costs.

N.S. *Civil Revision Petition dismissed.*

[FULL BENCH.]

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE PHILLIPS, MR. JUSTICE KRISHNAN AND MR. JUSTICE RAMESAM.

The Zamindar of Kallikote and Atagada Estates ... *Petitioner* in all the petitions (Appellant-respondent)*

v.

Mongolopur and others ... *Respondents (Petitioners).*

F. B.
Zamindar of Kallikote v. Mongolopur.

Madras Estates Land Act, S. 171—Case under—Board of Revenue—Single member of—Jurisdiction to decide—Allotment under S. 2 of Madras Act I of 1894 of that work to him—Effect—Interlocutory order—Interference in revision with—Practice of High Court—Preliminary order of Board of Revenue under S. 172—Interference with—Orders under Ss. 171 and 172 of Board of Revenue—Interference by High Court in revision with.

A single member of the Board of Revenue has power to decide questions under S. 171 of the Madras Estates Land Act, provided the Board has, under S. 2 of Madras Act I of 1894, allotted to him that branch of work.

The High Court will not ordinarily interfere with orders of an interlocutory nature unless there is some special reason for doing so.

Where an order passed under S. 172 of the Madras Estates Land Act was merely a preliminary order declaring that the Board of Revenue had jurisdiction in the case under that section but no final order had been made on the merits of the case, *held,* that the High Court would not at that stage interfere with the order.

Quaere: Whether the High Court has jurisdiction to interfere in revision with the orders of the Board of Revenue under Ss. 171 and 172 of the Madras Estates Land Act?

C.R.P.Nos. 159 *to* 168 *of* 1926.

Petitions under S. 115 of Act V of 1908 and S. 107 of the Government of India Act praying the High Court to revise the orders of the Board of Revenue (Land Revenue and Settlement), Madras, dated 7th December, 1925, 9th February, 1926 and 5th January, 1926 and made in Appeal No.43 of 1925 (Settlement Objection Petitions Nos. 2, 3, 14 and 15 of 1924 on the file of the Special Revenue Officer, Ganjam, Godavari and Kistna Districts, Berhampore) and in R. P No. 1 of 1926 (Appeals Nos. 2 to 15 and 29 of 1925 on the file of the Board of Revenue, Land Revenue and Settlement, Madras —O.P.Nos.2 to 6, 8, 11 and 12 of 1924 on the file of the said Special Revenue Officer), and in Appeal No.24 of 1925 (preferred against the order of the said Special Revenue Offi-

*C R P Nos. 159 to 168 of 1926 and
C M P Nos. 1346 to 1355 of 1926. 15th April, 1926.

cer, dated 30th December, 1924, in the case relating to the 8th group of villages), and in Appeal No. 25 of 1925 (Settlement Objection Petitions Nos. 7 and 28 of 1924 on the file of the said Special Revenue Officer), and in Appeals Nos. 36, 38 to 41 and 44 of 1925 (preferred against the orders of the said Special Revenue Officer, dated 22nd February, 1925, in the cases relating to the 11th, 14th, 12th, 10th, 9th and 5th groups of villages, respectively).

*C.M.P.No.*1346 *of* 1926.

Petition praying that in the circumstances stated in the affidavit filed therewith the High Court will be pleased to issue a writ of *certiorari* to quash the proceedings of Mr. N. MacMichael, 1st Member and Commissioner of Land Revenue and Settlement, Madras, dated 9th February, 1926 in the aforesaid R. P. No. 1 of 1926 on the file of the Board of Revenue, Land Revenue and Settlement, Madras, purporting to be in the exercise of revisional powers alleged to exist in the Board of Revenue, Madras, under S. 172 of the Madras Estates Land Act.

*C.M.P.Nos.*1347 *to* 1355 *of* 1926.

Petitions praying that in the circumstances stated in the affidavit filed with C. M. P. No. 1347 of 1926 the High Court will be pleased to issue writs of *certiorari* to quash the proceedings of Mr. N. MacMichael, Commissioner of Land Revenue and Settlement, Madras, dated 7th December, 1925 and 5th January, 1926, in the abovementioned Appeals Nos. 43, 36, 38, 39, 41, 25, 40, 24 and 44 of 1925 on the file of the Board of Revenue, Land Revenue and Settlement, Madras, purporting to be in the exercise of powers vested in the Board of Revenue under S. 171 of the Madras Estates Land Act and the rules framed thereunder.

S. Varadachariar and *C. Sambasiva Rao* for petitioner.

The Advocate-General and *B. Jagannatha Doss* for respondents.

The Court delivered the following

JUDGMENT:—These are applications to revise the orders of the Board of Revenue passed, one under S. 172 of the Estates Land Act and the others under S. 171 of the same Act. So far as the cases under S. 171 are concerned, the only point that is raised which relates to jurisdiction is that a single member of the Board of Revenue has no power to decide questions under these sections. However, under

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S. 2 of the Madras Act I of 1894 it is enacted—

"It shall be lawful for the Board of Revenue to declare what portion of the business of the Board may be disposed of by a single member."

It is not suggested here that the Board has not allotted this branch of work to a single Member and therefore that Member had complete authority to deal with the matter. No other question of jurisdiction arises in the case disposed of by the Board under S. 171.

So far as the order passed under S. 172 is concerned, it is merely a preliminary order declaring that the Board of Revenue has jurisdiction in the present case under that section but no final order has yet been passed on the merits of the case. It is contended that on this question of jurisdiction this Court ought to interfere in revision in order to save further proceedings. It is not ordinarily the practice of this Court to interfere with orders of an interlocutory nature unless there is some special reason for doing so. Here the petitioner has come to this Court before he has any grievance and consequently we are not prepared to interfere at this stage. In this view it is unnecessary to decide the question whether this Court has jurisdiction to interfere in revision with the orders of the Board of Revenue under Ss. 171 and 172. All these petitions must be dismissed with costs.

Civil Miscellaneous Petitions Nos. 1346 to 1355 must also be dismissed.

A.S.V. *Petitions dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE DEVADOSS AND MR. JUSTICE WALLER.

Kammaboyina Ramadas ... *Petitioner** (*Accused*)

v.

King-Emperor ... *Respondent* (*Complainant*).

Ramadas v. King-Emperor.

Madras Forest Act (V of 1882), S. 21 (d)—"Permits cattle to trespass"—Meaning of—Mere finding of cattle grazing within the forest reserve—Owner whether can be convicted.

The mere finding of cattle grazing within the forest reserve will not by itself make the owner of the cattle punishable under S. 21 (*d*) of the Madras Forest Act. The expression "permits his cattle to trespass" means something more than the cattle trespassing within the forest reserve If the owner, knowing that the cattle would trespass into the forest reserve, neglects to take proper care of his cattle, or, knowing that his servants would take the cattle

*Cr R C No. 536 of 1925. 1st February, 1926.

to the reserved forest, does not forbid them from doing it, or knowing that his servants might take his cattle to the reserved forest connives at it, then he might be said to permit the cattle to trespass; but, where without his knowledge or against his orders, his servants allow cattle to trespass into the forest reserve, he cannot be held to be guilty. 1 Weir's Criminal Rulings, 761 approved. *Rex* v. *Atmos*, (1770) 98 E R 411: 5 Burr. 2687 distinguished.

It is not necessary that there should be any overt act. Omission to take reasonable precaution against trespass knowing or having reason to believe that cattle would trespass into the forest reserve, would amount to permitting cattle to trespass within the meaning of S. 21 (*d*).

Observations to the contrary in *Queen-Empress* v. *Krishnayya*, (1891) I L R 15 M 156, disapproved.

Petition under Ss. 435 and 439 of the Code of Criminal Procedure, 1898, praying the High Court to revise the judgment of the Court of the Sub-divisional Magistrate of Narasaraopet in C.C.No.12 of 1925 (C. A. No. 14 of 1925, Court of Sessions, Guntur Division).

B. Jagannadha Doss for petitioner.

The Public Prosecutor for the Crown.

The Court delivered the following

JUDGMENT :—The petitioner was convicted under S. 21 (*d*) of the Forest Act (V of 1882) and sentenced to pay a fine of Rs. 200. His appeal to the Sessions Judge of Guntur was rejected on the ground that no appeal lay against the conviction in a summary trial, when the fine did not exceed Rs. 200. The petitioner has preferred this revision petition.

The contention on behalf of the petitioner is that the Deputy Magistrate has not correctly applied the law to the facts of the case and that the mere finding of the petitioner's flock of goats grazing within the forest reserve would not by itself make the owner of the goats punishable under S. 21 (*d*). Under that section "any person who pastures cattle or permits cattle to trespass" is punishable with imprisonment for six months or with fine which may extend to Rs. 500, or with both.

The statement of the law in paragraph 4 of the Deputy Magistrate's judgment—

"I hold that as the rightful owner of the flock, the accused is responsible for its actions and that his paid servants or agents cannot be solely taken to task. The word 'permit' used in the section has to be interpreted in its broadest sense and includes all the acts which, though done without his explicit orders, are such as to be guarded against"

is not correct. The expression "permit his cattle to trespass" means something more than the cattle trespassing within the forest reserve. In order to make the owner liable, there

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must be something more than the mere finding of his cattle within the forest reserve. If the owner, knowing that the cattle would trespass into the forest reserve, neglects to take proper care of his cattle, or knowing that his servants would take the cattle to the reserved forest, does not forbid them from doing it, or knowing that his servants might take his cattle to the reserve forest connives at it, then he might be said to permit the cattle to trespass ; but where without his knowledge or against his orders his servants allow cattle to trespass into the forest reserve, he cannot be held to be guilty. In this case it is a question of fact whether from the circumstances the Magistrate, as a Judge of fact, can come to the conclusion that the accused by his act or by his negligence permitted or allowed his cattle to trespass into the forest reserve. If the law is as stated by the Magistrate, then the owner of the cattle would be liable even if his enemy without his knowledge, or his servant, in spite of his orders, drives his cattle into the forest reserve. The law has been correctly stated by Muthuswami Aiyar and Brandt, JJ. in Cr.R.C.No.253 of 1886 reported in Weir's Criminal Rulings, Vol. I, at page 762 as follows :—

"A person certainly cannot be said to permit cattle to trespass into a reserve forest, unless he knows that such trespass is likely to be committed and neglects with such knowledge to take measures to prevent it. The essence of the offence consists either in a misfeasance, as in the case of one wilfully pasturing cattle, or in a nonfeasance as in his neglecting to take proper measures to prevent the cattle trespassing in circumstances from which it may be reasonably be inferred that such trespass might have been foreseen or known as the probable consequence of his negligence."

In *Queen-Empress* v. *Krishnayya* (1) all that the prosecution proved was that the defendant's cattle were found in a reserve. It was held that the accused was not liable. The decision therefore is correct, but, with great respect, we are unable to agree with the observation of the learned Judges that " the owner cannot be held liable unless some overt act of his be proved ". It is not necessary that there should be any overt act. Omission to take reasonable precaution against trespass knowing or having reason to believe that cattle would trespass into the forest reserve would amount to permitting cattle to trespass within the meaning of S. 21 (*d*).

The learned Public Prosecutor relies upon *Rex* v. *Almon* (2) and contends that it is for the accused to show that there was no negligence on his part or that his servants acted contrary to his orders and that in the absence of such evidence

1. (1891) I L R 15 M 156.
2. (1770) 98 E R 411: 5 Burr 2687.

the master is liable criminally for the acts of his servants and in that case the defendant was convicted for publishing a libel (Junius's Letters) in one of the magazines called *The London Museum* which was bought at his shop and even professed to be printed for him. Lord Mansfield stated the law thus—

"That proof of a public exposing to sale and selling at his shop by his servant was *prima facie* sufficient, and must stand still contradicted, or explained or exculpated by some other evidence, and, if not contradicted, explained or exculpated, would be in point of evidence sufficient or tantamount to conclusive. Mr. Mackworth's doubt seemed to be 'whether the evidence was sufficient to convict the defendant, in case he believed it to be true.' And in this sense I answered it. *Prima facie* it is good; and remains so, till answered. If it is believed and remains unanswered, it becomes conclusive. If it be sufficient in point of law and the juryman believes it, he is bound in conscience to give his verdict according to it."

This case has no application to the present case. There the libellous publication was sold in the defendant's shop and purported to have been printed for him. It was open to him to prove that the sale was without his knowledge and that the printing was done either contrary to his orders or without his knowledge. The Libel Act of 1843, VI and VII Vic. C. 96, S. 7, has made it clear that—

"It should be competent to such a defendant to prove that such a publication was made without his authority or knowledge and that the said publication did not arise from want of due care or caution on his part."

In the case of cattle trespassing within the forest reserve, the owner may be miles away from the reserve, and it cannot be said that the onus is upon him to prove that it was done without his authority or knowledge. In every case it is for the Magistrate who tries the case to find on the evidence whether the accused by some act or omission or by negligence allowed or permitted the trespass. If from the evidence on the side of the prosecution the Court could presume that the defendant, by his omission to take such reasonable care as the owner of the cattle should have allowed his cattle to trespass or knowing that the cattle would trespass failed to take such care as every prudent owner of cattle is expected to take, a *prima facie* case would be made out. Then, the onus of proof that he took all reasonable care to prevent cattle trespassing, or that the trespass was in spite of his care or against his orders, would be upon him. If he fails to make out that, he should be held to be guilty. But the prosecution cannot succeed by merely showing that a man's cattle was found within the forest reserve.

In this case, inasmuch as the Magistrate erred with regard to the statement of the law and convicted the accused without

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recording a finding that he either wilfully or negligently permitted the trespass or failed to take such care as would be necessary to prevent cattle trespassing into the forest reserve, the conviction cannot stand. We therefore set aside the conviction and direct that the accused be re-tried and the case disposed of according to law. The fine, if paid, will be refunded to the petitioner.

N. S. *Conviction set aside and re-trial ordered.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—SIR C. V. KUMARASWAMI SASTRI, *Offg. Chief Justice*, AND MR. JUSTICE CURGENVEN.

The Russa Engineering Works, Ltd. ... *Appellants** (*Plaintiffs*)

v.

The Kanara Transport Co (given up) and others ... *Respondents* (*Defendants*)

Russa Engineering Works, Ltd. v. Kanara Transport Co.

Contract Act (IX of 1872), S. 249—Partnership—Person entering into a partnership, agreeing to be liable for antecedent debts of the firm—Right of creditor to enforce the agreement and make him liable for such debts.

A partnership was started in 1922. In 1923 an agreement was entered into by which one of the partners ceased to be a partner from that date and a new person was taken in as a partner. This agreement contained a clause that all the partners should be jointly and severally liable for the debts of the concern till then incurred.

Held, that the person who entered the partnership in 1923 cannot be made liable to the creditor of the firm in respect of the antecedent transactions on the strength of the clause in the agreement executed between the partners *inter se.*

Apart from privity, a creditor of a firm is not entitled to rely on an agreement between the partners.

Jagarnath and Co. v. *Creswell,* (1913) I L R 40 C 814 distinguished. *Rolfe and the Bank of Australia* v. *Flower, Salting and Co.,* (1865) L R 1 P C 27 relied on.

On appeal from the order of the 28th January, 1925 of the Hon'ble Mr. Justice Waller passed in the exercise of the Ordinary Original Civil Jurisdiction of the High Court in C. S. No. 576 of 1923.

Nugent Grant and *K. S. Krishnaswami Aiyangar* for appellants.

V. Radhakrishnayya and *K. Sanjiva Kamath* for respondents.

The judgment of the Court was delivered by

Kumaraswami Sastri, Offg. C. J.

The Officiating Chief Justice :—This is an appeal that arises out of an application to execute a decree which was

*O S A No. 26 of 1925. 20th July, 1926.

passed against two defendants, the Kanara Transport Co. and Captain Bhandarkar. The decree, as is usual with decrees against firms, was obtained in the firm's name, there being at that time no question as to who were the partners of that firm. Under the Rules on the Original Side that question has to be raised, in cases where each of the alleged partner is not served personally, in execution of the decree. Where it is sought to execute the decree against persons who are not named but simply as against a firm, notice has to go to those persons to show cause why execution should not go against them as partners of the firm. In this case such notices went and we are concerned with two persons, Sanjeeva Rao and Panduranga Bhat. Sanjeeva Rao did not appear and contest the motion and an *ex parte* order for execution was passed as a matter of course. Panduranga Bhat appeared and denied that he was a partner. His case was that he was asked to become a partner in this firm by Captain Bhandarkar who is his brother-in-law, that he agreed to become a partner on condition that the accounts were looked into, and Sanjeeva Rao ceased to be a partner and he took his place as partner and that as none of these conditions was fulfilled he has not become a partner of the firm and therefore is not liable on any claim against the firm.

The partnership was started under an oral agreement; at any rate, we do not find any document evidencing the partnership when it was started. According to the evidence it was started on the 1st October, 1922. It is clear from the evidence and Exs. III, IV and VI that Panduranga Bhat was not a partner when the partnership was started or for some time afterwards. Ex. II, as to the genuineness of which there is no dispute, is dated the 17th April, 1923 and is signed by Panduranga Bhat, Bhandarkar, Sundar Rao and Shiva Rao. The document runs as follows :—

"We, *viz.*, (1) Uppinangady Panduranga Bhat, (2) P. R. Bhandarkar, (3) Kalle Sundar Rao, and (4) Kalle Shiva Rao, are the only partners of the concern named Kanara Transport Co., Mangalore, South Kanara, and there are no other partners. Mr. Kalle Sanjeeva Rao is no longer a partner of the firm. All the four partners are entitled to share in the profits and losses equally. All the four of us are jointly and severally liable for the debts of the concern hitherto incurred. A regular deed of partnership will be entered into within a fortnight from date."

It is clear from this document that there is a specific statement made that Sanjeeva Rao was no longer a partner of the firm, so that, even assuming the respondent's case to be true, one of the conditions that were necessary, namely, the retire-

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ment of Sanjeeva Rao, is specifically stated in Ex. II. As regards other conditions they are not set out in Ex. II and we agree with the learned Judge in thinking that we cannot import into Ex. II the other conditions alleged.

The learned Judge has disposed of the case on the ground that as the appellants have claimed against Sanjeeva Rao also as a partner and as it is not shown that he has left the firm, they cannot have it both ways and that therefore the fact that they claimed against Sanjeeva Rao is evidence to show that Panduranga Bhat could not be a partner. We think the proper way to appreciate the evidence in this case is first of all to see whether there is anything in the evidence to show that the statement which has been made in Ex. II that Sanjeeva Rao was no longer a partner of the firm is not correct. The onus, we think, clearly lies upon Panduranga Bhat who now wants to show that the recitals in Ex. II are not correct. There is no evidence that Sanjeeva Rao after the date of Ex. II did any act or made any assertion which could lead one to a reasonable supposition that he continued to be a partner of the firm. On the contrary Sanjeeva Rao went further than the statement in Ex. II. He denied that he ever was a partner of the firm and on the evidence there is nothing to show that Sanjeeva Rao either by reason of his own acts or by reason of any acts of the partnership can be treated as continuing as a partner of the firm after the date of Ex. II.

The next question is whether the plaintiffs by claiming against both Sanjeeva Rao and Panduranga Bhat have done anything which would support the case of Panduranga Bhat that he is not liable. The claim is in respect of dealings between the plaintiff firm and the firm of Kanara Transport Company. The account which appears on page 39 of the printed book, as to which there is no dispute, shows that dealings began on the 31st August, 1922 and went on till the 14th August, 1923 and Ex. II is dated 17th April, 1923 so that Sanjeeva Rao has gone out and Panduranga Bhat has come in under Ex. II after that date. Being a continuous transaction Panduranga Bhat would be liable for transactions from the 30th April, 1923, to the date when they close. Being one continuous transaction the plaintiffs would have to make both of them parties and claim against both of them in any event, and the fact that they chose to claim against Sanjeeva Rao in respect of the transactions subsequent to his withdrawal and against Panduranga Bhat for transactions antecedent to his

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coming in would not by itself be a ground for denying the plaintiffs such rights as they might have against each of the partners. We think that on the evidence it is difficult to hold that Sanjeeva Rao continued to be a partner after the date of Ex. II and, the onus being on the respondent to show that he ceased to be a partner, we do not think that we can hold that he has no liability under this decree.

As regards the liability of the respondent, we agree with the contention of Mr. Radhakrishnayya that we cannot make him liable in respect of antecedent transactions on the strength of an agreement contained in Ex. II between the partners *inter se* that he would be liable for transactions hitherto incurred and future liability. The law on this subject is, we think, clearly contained in S. 249 of the Indian Contract Act which expressly excludes such liability as regards the creditors of the firm. S. 249 of the Indian Contract Act is really the same as S. 17 of the English Partnership Act and the law has been set out in Lindley on Partnership (3rd Edition) pages 273 and 275. This view is also supported by the decision of the Privy Council in *Rolfe and the Bank of Australia* v. *Flower, Salting and Co.* (1). The learned Judge has referred to *Jagarnath and Co.* v. *Cresswell and others* (2), a decision of Imam, J., on a question of trademark, but if that decision held that apart from privity of contract a creditor of the firm is entitled to rely on an agreement between the partners, we respectfully dissent from it. It is, however, possible to distinguish that case from the present one that all the parties were aware of this agreement and entered into it on that footing. It seems to us to be clear that the respondent cannot be made liable for any transactions before the 30th April, 1923. Sanjeeva Rao has not appealed against the order which makes him liable for subsequent transactions but we have got power under the Code, even though he has not appealed. to adjust the rights so as to do justice between the present appellant and respondent. We think the proper order to make is to direct execution to go against Sanjeeva Rao for Rs. 5,334-3-3. As regards Panduranga Bhat execution will issue against him for Rs. 3,621-6-0 with interest at 12 per cent. from the various dates in the account till decree and 6 per cent. thereafter. As regards costs the respondent will pay the appellant half his taxed costs.

N.S. *Decree modified.*

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1. (1865) L R 1 P C 27. 2. (1913) I L R 40 C 814.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE PHILLIPS AND MR. JUSTICE MADHAVAN NAIR.

Sri Sri Sri Krishna Chandra Gajapathi Narayana Deo Maharajulugaru, Zamindar of Parlakimedi and Trustee of the Gods Sri Ramaswami and Sri Jagannadhaswami of Parlakimedi ... *Appellant** (*Plaintiff*)

v.

Yalla Ramayya (dead) and others ... *Respondents* (*Defendants* 2 *to* 18, 21 *to* 41, 43 *to* 81, 83 *to* 96, 98 *to* 117, 119 *to* 137, 139 *to* 149, 151 *to* 171, 174 *to* 222—*L. Rs. of respondents* 50, 118, 212, 35, 91 *and* 125).

Zamindar of Parlakimedi *v.* Ramayya.

Inam—Grant of—Presumption of grant of land itself or of the melvaram only—When tenant must prove occupancy rights.

In the case of an inam grant there is no presumption in favour of the inamdar that the grant is of the *land* itself or in favour of the tenant that it is of the ***melvaram*** only. Each case must be considered on its own facts irrespective of the question of onus. Where, however, the inamdar is proved or admitted to be the owner of the *land* itself, the burden of proving occupancy rights is upon the tenant. *Nainapillai Marakayar* v. *Ramanathan Chettiar*, (1923) I L R 47 M 337: 46 M L J 546 (P C) explained. *Venkata Sastrulu* v. *Seetharamudu*, (1919) I L R 43 M 166: 37 M L J 42 (P C) and *Sivaprakasa Pandara Sannadhi* v. *Veerama Reddi*, (1922) I L R 45 M 586: 43 M L J 640 (P C) referred to. *Periakaruppa Thevan* v. *Aiyanars and Kaniyalanswamigal Koil Devasthanam* (1925) 49 M L J 602 followed.

Appeal against the decree of the District Court of Ganjam at Berhampore, dated 29th November, 1920 in O. S. No. 3 of 1917.

The Advocate-General, S. Srinivasa Aiyangar, A. Krishnaswami Aiyar and *L. S. Veeraraghava Aiyar* for appellant.

P. Chenchiah, P. Venkataramana Rao and *K. Kameswara Rao* for respondents.

The Court delivered the following

Phillips, J.

JUDGMENT :—*Phillips, J.* :—The plaintiff-appellant, who is the Zamindar of Parlakimedi, brings this suit as trustee of Gods Sri Ramaswami and Sri Jagannathaswami, to whom the suit village of Kosamala was given as an inam either in 1500 or 1700 A. D. The plaint alleges that the grant consisted of both ***melvaram*** and ***kudivaram*** of the village and that originally rent was paid in kind on the varam system. For a long

*Appeal No. 177 of 1921. 23rd April, 1926.

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period, the Parlakimedi estate, including this inam village of Kosamala, was under the control of the Court of Wards, and in 1869 after the estate had been surveyed a settlement was effected and in that settlement certain money rents based on the nature of the soil and other advantages were fixed. This settlement has continued in force until the date of suit. The plaintiff sues for a declaration that this settlement was beyond the powers of the Court of Wards as trustee of the Gods and is not binding on the plaintiff. He also prays for a declaration that he is entitled to claim rent in kind from the defendants and for an injunction directing the defendants to pay rent in kind from fasli 1326. The plaint is somewhat curiously framed in view of the admitted facts of the case and it seems to have been framed in such a way as to bring this suit entirely within the jurisdiction of the Civil Courts. If, as alleged, the plaintiff is entitled to both varams in the lands, the defendants are mere tenants-at-will and the plaintiff could eject them or lease out the lands to them in any manner he pleases; consequently a suit for a declaration that the money rents are not binding on him seems to be merely a preliminary step before proceeding to exercise the powers which he alleges that he possesses. At the trial, however, a number of other points have been raised and in appeal the plaintiff's case has been put on two bases. Firstly, it is said that the plaintiff, as owner of both varams, is entitled to deal with the lands as he pleases. Secondly, it is contended that, if the *melvaram* alone vests in the plaintiff, then the act of the Court of Wards in making the settlement of 1869 is *ultra vires* and not binding upon him. This second claim is nowhere mentioned in the plaint but as the defendants pleaded that they had permanent rights of occupancy and that their rent had been settled for all time, the second portion of the plaintiff's case was also considered.

I will first deal with the plaintiff's prayer to revert to payment of rent in kind, by which is meant the varam system, under which the landlord takes a definite share of the produce. This undoubtedly is the system which originally prevailed in most parts of this presidency, for it has always been held that the ruler of the land was entitled to a share in the produce. It is on this theory and on no other evidence that the plaintiff's case must succeed, if at all. The village of Kosamala appears to have been held on a somewhat curious tenure. At the earliest date of which we have any evidence, the village as a

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whole was leased out to a mustajar who agreed to pay a certain fixed rent in money to the Zamindar. This system continued for a long time, but, in later years instead of leasing the village to a mustajar, the village was leased sometimes to the village officers on behalf of the villagers, and sometimes to a number of villagers and sometimes to all the cultivating ryots of the village. There is not a particle of evidence that the landlord ever dealt directly with each individual ryot and it is an essential part of the system of varam that each individual should contribute a definite share in what he produces to his landlord. This leasing system is, therefore, clearly not a varam system. We also have evidence that as far back as 1826, the rent of the village was paid in money. The plaintiff relies on certain remarks in Ex. JJ. as showing that there was a system of varam prevailing in his estate. Ex. JJ. consists of official correspondence from 1861 to 1864, which preceded the survey and settlement of the Parlakimedi estate. In this correspondence we find certain references (at pages 29 to 30 of the documents) that there were recognised shares of the produce paid as rent in certain parts of the estate, but there is no reference to such share being paid in Kosamala village. Here I may observe, that although there are admittedly separate accounts for Kosamala village, as of course there must be as it is a trust village, yet the plaintiff who was the trustee has failed to produce any one of these accounts. The only inference that can be drawn from this conduct is that the accounts, if produced, would be unfavourable to his case. Seeing then that there is no evidence of varam rent having been paid in Kosamala at any time and that from so far back as 1826 the rent has always been paid in money, it is impossible for the plaintiff to revert to the system of varam when there is no evidence that it ever existed. Although, therefore, the right of the landlord to revert to varam rents is a very usual right it is clear that the plaintiff has not proved that he has that right for there is no evidence that such a tenure existed. It is only if it is proved that he is the owner of both the varams that he would have such a right, for he would be dealing with tenants-at-will and can impose.

Coming to his first prayer that there should be a declaration that the settlement, by which the village has been leased out for money rent according to fixed block rates, is beyond the powers of the trustee, it must be observed that the plaintiff bases his case on the allegation that varam rent was commuted by the Court of Wards into fixed money rent payable for all

time. I have shown above that this is clearly wrong, for when the settlement was made, the rent prevailing in the suit village was money rent and all that the Court of Wards did was to survey and classify the village and determine the proper money rent payable on the land. In doing this, they cannot be said to have exceeded their powers unless it can be shown that they granted a permanent lease which would not be binding on the trust estate.

The third prayer for an injunction directing the defendants to pay rent in kind before any agreement has been made with them is clearly untenable when the plaintiff fails to show that such rent is customary or the subject of a contract.

Prima facie, therefore, the three prayers put forward in the plaint are unsustainable unless we go into the question of whether the plaintiff is or is not the owner of both varams in the land. Seeing that the plaintiff has put forward his case as he has, I should have felt inclined to dismiss his suit *in limine* on the ground that the declarations asked for are entirely futile if the plaintiff's allegation that he owns both varams is true. But as the further question has been raised in the trial and argued here at considerable length I will proceed to deal with it.

It has been found by the District Judge that the plaintiff is the owner of both varams and this finding is based on a supposed presumption in plaintiff's favour coupled with the fact that the defendants have not proved their occupancy rights. This presumption that the grant of an inam is presumably the grant of the land itself, is sought to be justified by the recent decision of the Privy Council in *Nainapillai Marakayar* v. *Ramanathan Chettiar* (1). In that case the trustees of certain temple lands sued to eject the tenants who pleaded occupancy rights. It was there held that the onus was upon the defendants to prove that they had a permanent right of occupancy. Putting the result of the case as above, it would appear to be directly opposed to the decision of their Lordships in *Sivaprakasa Pandara Sannadhi* v. *Veerama Reddi* (2). It was formerly held by this Court that in the case of inams, especially in the case of inams granted to Brahmans, the presumption was that the grant was of *melvaram* only and not of the land itself. This presumption was held not to exist in *Suryanarayana* v. *Patanna* (3), which was affirmed in *Venkata*

1. (1923) I L R 47 M 337: 46 M L J 546 (P C).
2. (1922) I L R 45 M 586: 43 M L J 640 (P C).
3. (1918) I L R 41 M 1012: 36 M L J 585 (P C).

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Sastrulu v. *Seetharamudu* (4). In *Muthu Goundan* v. *Perumal Iyen* (5) a Full Bench of this Court after considering the above rulings held that there was a presumption in law that in an inam grant, both *melvaram* and *kudivaram* are included. This Full Bench decision was expressly overruled in *Sivaprakasa Pandara Sannadhi* v. *Veerama Reddi* (2). If, therefore, we are to take it that the decision of the Privy Council in *Nainapillai Marakayar* v. *Ramanathan Chettiar* (1) means that in all suits by an inamdar to eject a tenant, there is a presumption in favour of the inamdar that he is the owner of the land itself and that, therefore, the burden is on the tenant to prove that he has occupancy rights, the decision will be in direct conflict with that in *Sivaprakasa Pandara Sannadhi* v. *Veerama Reddi* (2). The learned Advocate-General for the appellant asks us to adopt this view, namely, that later decision in *Nainapillai Marakayar* v. *Ramanathan Chettiar* (1) directly overrules the decision given only a year earlier, to which three of the Judges who gave the later decision were parties. That they should have overruled their own recent judgment without express reference thereto seems to me impossible and if the two decisions can be reconciled, it should be done. I had to consider this point, sitting as a single Judge, in *Periakaruppa Thevan* v. *Aiyanars and Kaniyalaswamigal Koil Devasthanam* (6) and there I came to the conclusion that the decision in *Nainapillai Marakayar* v. *Ramanathan Chettiar* (1) by which the burden of proving occupancy right is thrown on the tenant is only applicable in cases where the inamdar is proved or admitted to be the owner of the land itself. A closer scrutiny of the judgment in *Nainapillai Marakayar* v. *Ramanathan Chettiar* (1) confirms me in this view. The judgment starts by stating as a principle of law that

> "It cannot now be doubted that when a tenant of lands in India, in a suit by his landlord to eject him from them, sets up a defence that he has a right of permanent tenancy in the lands, the onus of proving that he has such right is upon the tenant."

Then instead of making the presumption that the landlord is the owner of the land, their Lordships proceed to consider the terms of the grant to the plaintiff and find that the grant included the land itself. They then proceed to consider

1. (1923) I L R 47 M 337: 46 M L J 546 (P C).
2. (1922) I L R 45 M 586: 43 M L J 640 (P C).
4. (1919) I L R 43 M 166: 37 M L J 42 (P C).
5. (1921) I L R 44 M 588: 40 M L J 429 (F B).
6. (1925) 49 M L J 602.

whether the tenants have proved that they had any occupancy rights. When, therefore, the principle abovementioned was laid down, I think that the words "tenant of lands" must mean "tenant of lands belonging to his landlord," that is to say, that the landlord has a right not merely to the *melvaram* but to the land itself. In this view the two judgments are not inconsistent and I therefore adopt it.

We then have to consider the evidence as to the grant. The plaintiff relies on three documents, Exs. IV, J and K, which all relate to the enfranchisement of the plaint inam. The original grant is not available. These documents all show that the rent was a money rent. There is no specific reference to the grant of the land itself. The plaintiff relies on the statement in Ex. J that the area of the village is given. There is really nothing conclusive on the point in any of these documents, but there is a recital in column 12 of Ex. J., namely, "The average net profits of the amaniyadar are 2,000 rupees" and this is a somewhat peculiar phraseology if the amaniyadar or inamdar was really the owner of the lands themselves. We have no other evidence to support the plaintiff's case, but we have certain circumstances which do support the defendants' claim to occupancy rights. The defendants and their predecessors have been in possession of these lands for as long as we have any record. If there is any record of a different state of affairs at an earlier date, the plaintiff would have produced it. It may therefore be taken that for a very long time the cultivators of the lands have been the defendants and their predecessor-in-interest. It is also very significant that the earliest tenure of which we have any record is this system of *mustajari*, namely, leasing out the whole village to a middleman. The middleman is responsible for the rent of the whole village and it is he that has to make his arrangements with the cultivators of the village lands. There is no direct dealing between the inamdar and the cultivator of the land. The rent payable by the *mustajar* must naturally have been proportionate to the rent that he will receive from the ryots. It may fairly be presumed, therefore, that when he took a lease the lands were under cultivation by the ryots. Inasmuch as there has never been any direct dealing between the inamdar and the ryots, the inference is strong that these ryots were in possession of the lands without the intervention of the inamdar. There is yet another piece of evidence in favour of the defendants and that is Ex. JJ. From a perusal of this exhibit, which consists of official correspondence between Govern-

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ment Officers, it will be seen that in making the settlement of the Parlakimedi estate, the officials were concerned with preserving not only the interests of the Zamindar but also the interests of the cultivating ryots. It must be assumed that these officers, at the time when they wrote, namely, from 1861 to 1864, were aware of all the circumstances of the case and were of opinion that the cultivating ryots had certain rights which required protection. It is well known that many cultivating ryots in this Presidency do possess occupancy rights and such rights have been expressly recognised by statute in lands within estates. This right conferred by statute cannot be said to be a new grant entirely but it is only a statutory recognition of what had in many cases previously existed. Parlakimedi is an estate within the meaning of the Act I of 1908 and the suit inam is within the ambit of that estate. It is not, therefore, difficult to assume that the rights of the cultivators which the Government officials sought to protect was the right of permanent occupancy. We have also evidence that from 1870 at least, the defendants have been alienating their lands to the knowledge, and with the permission of the inamdars [Exs. V to IX and XII]. No doubt, as pointed out in *Nainapillai Marakayar* v. *Ramanathan Chettiar* (1), such alienations are not necessarily proof of occupancy right. They may merely mean that the trustees are lax in their duties, but in this case they are put forward to corroborate the other evidence of occupancy right, and I think some importance must be attached to them. I am, therefore, satisfied on the evidence that the defendant have proved permanent right of occupancy in the land.

It now remains to consider whether, in these circumstances, the action of the Court of Wards in making a settlement in 1869 was *ultra vires* or not. Two contentions are raised by the appellant: (1) that the settlement was in effect a grant of permanent lease and consequently a grant beyond the powers of a trustee, and (2) that it was a grant of permanent occupancy right. The second objection must necessarily fail, for the Court of Wards cannot be said to have granted a right which already belonged to the defendants.

Coming to the first objection, it is alleged that this settlement was in effect the grant of a permanent lease.' I have already found that the prevailing rent was money and not kind and consequently, the settlement made no alteration in this respect. The village was surveyed and the fields classified

1. (1923) I L R 47 M 337 at 356: 46 M L J 546 (P.C).

according to the soil, position, etc., and certain rates were proposed and finally accepted by the Court of Wards. The leases from 1869 were granted annually for the whole village. Of late years these leases have been in the names of all, or nearly all, the cultivating tenants, but the lease amount was fixed on the village as a whole although we find that an amount was fixed for each separate holding. This procedure appears to have been adopted in order that the ryots may know the amount payable by each individually, but in so far as the lease is concerned the signatories to the lease were all and every one individually liable to pay the whole lease amount. Recently in 1907 it has been sought to give individual leases to the ryots, but of that procedure the plaintiff makes no complaint in his plaint which relates only to the settlement of 1869. The Court of Wards in no way bound itself to grant these leases in perpetuity and, if the leases, such as Ex. EE, are perused, it is clear that they were to be in force for only one year. If, therefore, the tenants had any occupancy rights, there was no grant by the Court of Wards of a permanent lease. No doubt, the defendants have alleged in their written statement that the settlement was intended to be for all time and it had been acted upon ever since 1869. This assertion in itself will not give the right to a permanent tenure to the ryots after 1869, for the other contracting party is not bound by it in any way. The settlement, therefore, cannot be deemed to be the grant of a permanent lease.

It appears that prior to the settlement the rent of the whole village was somewhat less than that fixed by the Court of Wards. The lease of 1869, therefore, was in no way detrimental to the trust, for the trust received an enhanced income therefrom. The plaintiff's prayer, therefore, for a declaration that this settlement is not binding on him as the present trustee must be disallowed. Any remedy which the plaintiff may have must be subject to the defendants' rights of occupancy in the land and he must proceed to seek any relief claimed by him in accordance with the provisions of the Estates Land Act. It is unnecessary to discuss here what form this relief can take, for that is a question which must be left to the plaintiff to decide for himself.

I may here observe that the above examination of the case has justified the remark made earlier that the plaintiff framed his suit in a somewhat peculiar manner in order to bring it within the jurisdiction of the Civil Court. As he has

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chosen to do this, he must abide by the result, and that is that the relief claimed by him in his plaint must be disallowed.

The appeal is accordingly dismissed with costs.

Madhavan Nair, J. :—This appeal arises out of a suit instituted by the Zamindar of Parlakimedi as trustee of Gods Sri Ramaswami and Sri Jagannadhaswami for a declaration that the settlement by the Court of Wards of the Mokhasa Amania village of Kosamala granted in inam to the Gods fixing an annual money rent is not binding on him and that he, as the present trustee of the said Gods, is entitled to revert to the old system of claiming rent in kind from the tenants in respect of their holdings. The defendants are the tenants of the Kosamala village. The plaintiff alleged in the plaint that both the *melvaram* and the *kudivaram* of the village was granted in inam to the Gods, that the varam system of sharing the produce prevailed in the village before the Court of Wards during the management introduced the fixed money rental system in or about 1869, that the system thus introduced is detrimental to the said trust and is not binding on him, that the tenants are not entitled to insist on leases with a fixed money rent it being open to the landlord to fix the kind of rent, that he sent notices to defendants intimating that he would claim rent in kind from them and that as they did not accept his demands he has instituted this suit for the declaratory relief already referred to.

The defendants pleaded that the grants to the temple consisted only of *melvaram*, that the *kudivaram* was always vested in them, that the varam system was never in force in this village, that the Court of Wards by their arrangement only confirmed the system of payment in money that always prevailed, that it was introduced in the best interests of the Gods and all the parties, that it was within the powers of the trustee to make such an arrangement and that the Zamindar was not estopped from going back upon this arrangement which has been uninterruptedly followed for a long time and that the plaintiff's suit was barred by limitation.

It will be observed from the summary of the pleadings just given that the plaintiff based his claim for the declaratory relief on the ground that the grant of the village to the Gods consisted of both *melvaram* and *kudivaram* in the village and that really the tenants are therefore only tenants-at-will whom he could eject according to his discretion after giving proper notice if they did not comply with his demands (*see* paras. 3,

12 and 14). In this view, the question of declaring that the arrangement of the Court of Wards fixing a permanent money rent is not binding on the plaintiff and the other incidental questions raised in the case do not necessarily arise inasmuch as the plaintiff, as the owner of both the *melvaram* and the *kudivaram* can make whatever arrangements he likes with the defendants who are only his tenants-at-will and his suit has to be dismissed. But the pleadings and the issues cover a much wider ground. It is obvious that what the plaintiff really wants in this case is an adjudication of what he states as a fact, viz., that the temple owns both the *melvaram* and the *kudivaram* and the defendants have given prominence to this question by averring in their statement that they have always had permanent *kudivaram* rights in their holdings. The question of permanent occupancy has thus assumed considerable importance in this case. Giving the pleadings this extended scope, the case of the plaintiff was argued by the learned Advocate-General also on the assumption that the temple owned only the *melvaram* right in the suit village. The learned District Judge dismissed the suit and thereupon this appeal was filed by the plaintiff.

The arguments at the Bar mainly dealt with the following questions :—

(1) Whether the *melvaram* and the *kudivaram* of the lands in the village of Kosamala were vested in the Gods Sri Ramaswami and Sri Jagannadhaswami?

(2) Did the defendants pay *varam* rent in kind according to the sharing system as alleged by the plaintiff ?

(3) What is the nature of the arrangement effected by the Court of Wards in 1869 and is the plaintiff entitled to question it ?

(4) Is the plaintiff's suit barred by limitation ?

(5) Is the plaintiff entitled to the declaration and injunction prayed for ?

The village of Kosamala is a pre-settlement inam. It was granted in inam to the two Gods by Pratapa Rudra Narayana Dev, the Zamindar of Parlakimedi, in or about the year 1500. The Zamindar was also the hereditary "trustee of the said Gods". The Parlakimedi Estate was under the management of the Court of Wards from 1830 to 1890 and again from 1905 till 1913 when the plaintiff attaining majority took its management into his hands.

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In early times—prior to the Settlement and the advent of the Court of Wards—it is admitted that the revenue of the Zamindari was collected either on the Kustajari or the Kosht Guta system. "In the Kosht Guta system an entire village is rented out to the whole body of ryots who make themselves jointly and severally responsible for the payment of the village revenue, irrespective of the land which they may choose to cultivate." [See page 241 of the *Ganjam District Manual.*] "The Mustajari system is resorted to when money is scarce or when the landlord wants ready money or wishes to save himself the trouble of dealing with the ryots individually. The privilege of collecting the rents of the village or villages is put up to auction and sold to the highest bidder. The mustajar or renter makes an advance of money to the Zamindar and collects what he can in kind from the ryots who suffer accordingly." [See page 242 of the *Ganjam District Manual.*] Taking charge of the estate immediately after the rebellion, the Court of Wards proceeded to survey and settle the estate. "In 1861 a survey on what is called the block system was commenced and finished in 1867. In 1868 a rough classification of soils based on this block survey was made and the rates of the different soils were fixed." [See page 33 of the *Ganjam District Manual.*] Ex. JJ series are the proceedings of the Court of Wards relating to this Survey and Settlement. These proceedings show that the Court of Wards gradually fixed a new scale of money rents. In Communication No. 1198 the Court fully approved the principle of moderation on which the Collector proposed to proceed in making the detailed assessment of the lands in this estate but they doubted whether Rs. 3-8-0 per acre was a sufficiently moderate rate to be put on dry lands of ordinary quality as a permanent demand. [See page 22 of the printed papers.] From the same communication we see that hope was entertained that the cultivators of Kimidy would probably under the survey and tarumwar assessment pass from the joint rent system of permanent individual holdings. In or about 1869 fixed money payments on the block survey system came into general vogue and holdings in the village were thus leased out annually at first on the Kosht Guta or joint lease system which gradually after 1905 made way for individual war collections. Exs. BB and EE are instances of such joint muchilikas. Ex. XVIII is a patta executed to a cultivator of Kosamala village. It is this system of annually leasing out the village at a money rent determined according to fixed

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block rates that is sought to be set aside by the Zamindar on the various grounds which have already been noticed. I will now proceed to discuss the grounds.

The first question for determination is as regards the nature of the estate that was granted in inam to the Gods by the Zamindar of Parlakimedi. If both the *melvaram* and *kudivaram*, as already pointed out, were conveyed in inam, then there can be no doubt that the defendants are only tenants-at-will and the trustee, the Zamindar, is not bound by any prior arrangement made by the Court of Wards. On this question evidence has been let in by both sides, but it was argued as a question of law by the learned Advocate-General for the appellant that, according to the decisions, the burden of proving that they have rights of permanent occupancy in the lands lay upon the tenants, defendants, and since they have not discharged this initial burden by the evidence they have adduced the appellant, the inamdar, is entitled to succeed, however slender his evidence might be as regards the nature of the grant. In support of his position strong reliance has been placed by the learned Advocate-General on the following observation of their Lordships of the Privy Council in *Nainapillai Marakayar* v. *Ramanathan Chettiar* (1) :—

"It cannot now be doubted that when a tenant on land in India, in a suit by his landlord to eject him from the land, sets up a defence that he has a right of permanent tenancy in the land, the onus of proving that he has such right is upon the tenant."

On behalf of the defendants it is pointed out that the broad interpretation sought to be put on this dictum is not warranted by the previous pronouncements of the Privy Council which go to show that in deciding with reference to evidence whether occupancy rights exist in lands granted in inam there is no presumption in favour of the inamdar or pattadar on the one side or the ryot on the other and that "each case must therefore be considered on its own facts" irrespective of the question of onus. [See *Sivaprakasa Pandara Sannadhi* v. *Veerama Reddi* (2) and *Venkata Sastrulu* v. *Seetharamudu* (4)].

For a long time the decision of this Court took the view that an inam grant conveyed only the *melvaram*. In *Suryanarayana* v. *Patanna* (3) the Privy Council pointed out that

1. (1923) I L R 47 M 337: 46 M L J 546 (P C).
2. (1922) I L R 45 M 586: 43 M L J 640 (P C).
3. (1918) I L R 41 M 1012: 36 M L J 585 (P C).
4. (1919) I L R 43 M 166: 37 M L J 42 (P C).

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there is no such presumption of law. Without expressly laying down that the grant conveyed the entire proprietary interest in the land including the *melvaram* and the *kudivaram*, their Lordships examined the evidence and decided that permanent occupancy rights were not proved in the case. In *Venkata Sastrulu* v. *Seetharamudu* (4) their Lordships affirmed their previous decision and stated—

"Each case must, therefore, be considered on its own facts and, in order to ascertain the effect of the grant in the present case, resort must be had to the terms of the grant itself and to the whole circumstances so far as they can now be ascertained."

These Privy Council decisions were differently understood by different Benches of this Court. In one set of cases it was held that both the *melvaram* and the *kudivaram* interest passed to the grantee unless the contrary was shown. In another set of cases it was held that there was no presumption either way according to the Privy Council cases. When the question came before a Full Bench in *Muthu Goundan* v. *Perumal Iyen* (5) the learned Judges held that there was an initial presumption in favour of the grant of both *varams*, thereby suggesting that the onus of proving that he has permanent rights of occupancy lay on the tenant. All these cases were referred to in *Sivaprakasa Pandara Sannadhi* v. *Veerama Reddi* (2). With reference to the Full Bench decision their Lordships state thus :—

"A Full Bench of the Madras High Court, however, has in a recent case in *Muthu Goundan* v. *Perumal Iyen* (5) held that underlying the exposition of their Lordships such an initial presumption is to be inferred. Their Lordships cannot help observing that in drawing this inference the learned Judges are clearly in error. Each case must be dealt with on its own facts, with special regard to the evidence and circumstances therein. When the entire evidence on both sides is once before the Court, the debate as to onus is purely academical."

Here is a clear and express pronouncement of the Privy Council as regards the non-existence of the presumption and also as to how each case should be dealt with. This case has not been referred to in *Nainapillai Marakayar* v. *Ramanathan Chettiar* (1). Are we to understand that the Privy Council have gone back upon this view in *Nainapillai Marakayar* v. *Ramanathan Chettiar* (1) and affirmed in effect the view of the Full Bench in *Muthu Goundan* v. *Perumal Iyen* (5) which their Lordships expressly stated was wrong ? I think not. Subsequent to the decision in *Nainapillai Marakayar* v. *Rama-*

1. (1923) I L R 47 M 337: 46 M L J 546 (P C).
2. (1922) I L R 45 M 586: 43 M L J 640 (P C).
4. (1919) I L R 43 M 166 at 171: 37 M L J 42 (P C).
5. (1921) I L R 44 M 588: 40 M L J 429 (F B).

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nathan Chettiar (1) the dictum of their Lordships with reference to the burden of proof has been referred to in some decisions of this Court. In *Tirupathi Goundan* v. *Shamanna Goundan* (7) and *Annamdevula Thata* v. *Khwaja Ahamadulla Khan Saheb Bahadur* (8) the learned Judges refer to the principle and give effect to it without considering the question how far it is in conflict with the principles enunciated by the Privy Council in *Sivaprakasa Pandara Sannadhi* v. *Veerama Reddi* (2). In *Challamma* v. *Pentayya* (9) the facts showed that the lands in question were originally forest lands in the zamindari and as regards such lands, as pointed out by the learned Judges, the High Court had held that the Zamindar owned an absolute interest in them. In such circumstances the onus of proving that he has an occupancy right certainly lay on the tenant. In *Periakaruppa Thevan* v. *Aiyanars and Kaniyalaswamigal Koil Devasthanam* (6) my learned brother pointed out that the dictum in *Nainapillai Marakayar* v. *Ramanathan Chettiar* (1)—so much relied upon by the learned Advocate-General—should be understood with reference to the particular facts of the case. The dictum of the Privy Council as regards the burden of proof is based upon two decisions referred to by their Lordships, viz., *The Secretary of State for India in Council* v. *Luchmeswar Singh* (10) and *Sethuratnam Aiyar* v. *Venkatachala Goundan* (11). *The Secretary of State for India in Council* v. *Luchmeswar Singh* (10), after examining the facts of the case, their Lordships state thus :—

> "The Government undoubtedly are tenants of the Darbhanga Raj. It is for them to show why the landlord may not recover his property.........If we could not find out the origin of these things, there would be strength in that argument. But as the origin of them is known, the argument loses its force."

In *Sethuratnam Aiyar* v. *Venkatachala Goundan* (11) the following observations occur :—

> "The plaintiff's title was conceded, and the notice by which he purported to terminate the defendants' tenancy was not disputed. It was also admitted that the defendants held under, if not from, the plaintiff. To resist the plaintiff's claim the defendants set up a permanent tenancy or an occupancy right in themselves."

The facts of these cases and these observations show that in both of them, as pointed out by my learned brother, it was

1. (1923) I L R 47 M 337: 46 M L J 546 (P C).
2. (1922) I L R 45 M 586: 43 M L J 640 (P C).
6. (1925) 49 M L J 602.
7. (1924) 48 M L J 654.
8. (1924) 48 M L J 701.
9. (1924) 20 L W 478.
10. (1888) I L R 16 C 223 (P C).
11. (1919) I L R 43 M 567: 38 M L J 476 (P C).

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either admitted or found as a fact that the tenants had been let into possession by the landlord who was the absolute owner and that consequently when the tenant claimed to possess occupancy right it was incumbent on him to prove it. When similar circumstances arose in *Nainapillai Marakayar* v. *Ramanathan Chettiar* (1), their Lordships affirmed the same principle. In that case the facts show that the lands in respect of which a decree in ejectment had been made were part of the endowed property of the temple. Their Lordships after examining the terms of the grant found that the grant included the entire proprietary interests in the land and then they proceeded to consider whether the tenants have proved that they possess permanency rights (*see* page 351). When the landlord owns both the *melvaram* and the *kudivaram* interests in the land and the tenant sets up occupancy rights in such land the burden of proving that he has such rights is on him. If the dictum referred to in *Nainapillai Marakayar* v. *Ramanathan Chettiar* (1) is thus understood it is not inconsistent with the decision in *Sivaprakasa Pandara Sannadhi* v. *Veerama Reddi* (2). The decision in *Subbarayudu* v. *Narasimha Rao* (12) does not express any definite opinion on this question. It follows as a result of this discussion that we have to decide the question whether occupancy rights exist in this case or not by examining the entire evidence given by both the parties.

As already mentioned, the grant is an ancient one having been made by the Zamindar of Parlakimedi in or about the year 1500. It is clear from the evidence, and this is more or less conceded, that at the time of the grant and long before that, the prevailing tenure was the Mustajari or Kosht Guta system. This shows that there have always been cultivating tenants in the estate. This Mustajari or Kosht Guta system continued for a long time after the grant also. When we examine the history of the holdings we find that the tenants have been dealing with them in a way which will show that the *kudivaram* interest vested with them. Exs. V to XX are alienations of holding by the tenants and these have been proved to have been made to the knowledge of the Estate. Exs. V, XV and XVI are sales by tenants which range over a period from 1870 to 1903. The cultivators' holdings were always shifting (*see* Ex. JJ, page 19 of the printed papers).

1. (1923) I L R 47 M 337: 46 M L J 546 (P C).
2. (1922) I L R 45 M 586: 43 M L J 640 (P C).
12. (1924) 47 M L J 558.

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The inamdar did not really concern himself with the way how the holdings were dealt with by the tenants. He did not deal with them directly. The Mustajar who collected the rent gave him the promised amount and he was quite satisfied. P. W. 4 gives evidence to the effect that the tenants have inherited their holdings from generation to generation. In fact, evidence of succession from father to son cannot be denied by the Estate. This is evidenced from the fact that the defendants are sued as representatives of the tenants who occupied the land in 1869 when the system complained of was introduced by the Court of Wards. Ex. JJ series already referred to show clearly that the tenants had valuable rights in the land which the Court of Wards showed an anxiety to protect. Ex. E shows that the ryots who had left the village of Kosamala when conditions were unfavourable wanted to return to their old holdings in their own village and when there were difficulties in connection with that, they asked the Collector to give them protection. This is the state of affairs that is generally disclosed by the evidence given by the tenants. Turning to the evidence given by the inamdar it is extremely meagre and inconclusive. The inam grant is not before us, but the plaintiff strongly relies upon Exs. K, IV and J to show that he owns both the *kudivaram* and the *melvaram* in the village. Exs. K and IV are statements made before the Inam Commissioner and Ex. J is a copy of extract from the Inam Register. In Ex. J it is stated that the lands are cultivated annually. The learned Advocate-General argues that the use of the word 'lands' shows that the entire land meaning both the *melvaram* and *kudivaram*, that is, the entire proprietary interest in the land, must have been granted to the inamdar. I am satisfied that no conclusive inference of this kind can be drawn from the mere word 'lands' in Ex. J. The observations of Venkatasubba Rao, J. in *Chidambara Gurukkal* v. *Sundaram Pillai* (13) with reference to such an argument put before him may be referred to with advantage here :—

"The word 'land' is not used with special reference to the subject of the grant..............In the context, no significance attaches to the use of the particular word 'land'. The tenants are not parties to this document and there was no occasion to refer to the rights of the inamdar as distinguished from those of the tenants."

On a consideration of the entire evidence I am satisfied that the defendants who are tenants of the Kosamala village have proved that they own the *kudivaram* interest in their

13. (1924) 47 M L J 598.

holdings. The finding of the District Judge to the contrary cannot be accepted. He discusses the question in paragraph 30 of the judgment, but beyond a reference to a few decisions of this Court and a statement of some aspects of the evidence given by the defendants, there is no real examination of the evidence relating to the question, nor is there any reference to the evidence of the plaintiff. His finding is unsatisfactory, and, as I have shown above, cannot be accepted.

The next question for consideration is, what is the system of payment of revenue that prevailed in this village prior to the introduction as mentioned by the plaintiff for the first time of the money rent system by the Court of Wards? The plaintiff contends that the system that existed was the *varam* system, while the tenants state that the payment of money rent was the system in vogue and that the Court of Wards did not introduce any innovation but "simply confirmed the system that always prevailed". There is no evidence in support of the plaintiff's contention. If his case is true, he should have been able to support it by producing the accounts of the Estate. It cannot be said that there are no accounts relating to the revenue collections of Kosamala village. Exs. J and IV refer to accounts of certain specified fasli years. Ex. F refers to cash balance report. These documents show the existence of accounts which *prima facie* would be the best evidence in support of the plaintiff's contention. Instead of producing those accounts he leaves it to the Court to draw inference as regards the practice of rent collections prevailing in the village. The failure to produce these accounts is fatal to the plaintiff's case. The inference is that, if the accounts were produced, they would probably support the contention of the defendants and hence they have been kept away from the scrutiny of the Court. Instead of producing his accounts, the plaintiff relies on reference to shares which are found in the correspondence of the Court of Wards, Ex. JJ series, relating to the block survey and subsequent settlement. These do not by any means prove that the *varam* system prevailed in the Kosamala village prior to the management by the Court of Wards. Further, as pointed out by the defendants, there is nothing to show that these proceedings relate to the Kosamala village also. Admittedly they deal with the settlement of the Zamindari tract. No doubt one of the proceedings, No. 6589, as pointed out by the learned Advocate-General, refers to classification and assessment of an area including 'inam villages'. This does not specifically show that the

Kosamala village is included in these proceedings as there were also other inam villages in the Zamindari. However, the point is not of much importance as none of these documents, Ex. JJ series, prove that the *varam* system prevailed at the time when the Court of Wards introduced payment of money rents fixed on the block survey system. The evidence given by the tenants shows that money payment must have been the system which prevailed even before the Court of Wards took up the management and confirmed it. Ex. I prepared in 1835 is an account of the year 1826 prior to the management of the Court of Wards. This refers to the *kist* of wet and dry land. This means assessment of revenue in money. In Ex. XX, dated 1860, a complaint preferred by five men of Kosamala to the Acting Principal Assistant Collector of Ganjam District, reference is made to the fact that the lands directed to be put in complainant's possession bore *a kist of Rs*. 76. Ex. J states that the village has been providing an average net profit of Rs. 2,000. It also says that the assessment comes to Rs. 5 an acre. Ex. IV under column 14 makes mention of cash rent as per lease by the Zamindar and gives the rates. Ex. K also refers to cash payment. The evidence given by the defendants shows that money rents prevailed in this village from 1826 to 1865. Admittedly it prevailed since that date also. It is suggested that it must have prevailed prior to 1826 as well. According to the Mustajari or Kosht Guta system the Zamindar received payment due to him in money. It seems to me that the reference to *kists* and omission of any indication of the existence of sharing system show the contentions of the defendants to be true. On this point the District Judge has come to a correct conclusion and I agree with his opinion. It follows that the plaintiff has not made out a case that he is entitled to claim rent in kind from the defendant in respect of their holdings. The prayer for declaration and injunction as regards this right cannot therefore be granted to him.

The third question for consideration is as regards the nature of the arrangement effected by the Court of Wards in 1869. It is alleged by the plaintiff that it was introduced "for all time in respect of the village and is detrimental to the interests of the trust." (*See* paragraph 9 of the plaint.) The defendants allege that "the Court of Wards did nothing by way of innovation but simply confirmed the system that always prevailed." (*See* paragraph 10 of the written statement.) There is no evidence that a permanent arrangement fixing

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the rates for ever binding on the estate as a permanent settlement was ever introduced by the Court of Wards. As I have already shown payment of rent in money prevailed when the Court of Wards took up the management. By block surveying the Zamindari and settling the rates on that system they only placed the existing arrangement on a more scientific and definite basis. There is no evidence to show that they effected what may be called alienations of land by giving permanent leases on fixed money rates as contended for by the plaintiff. It is admitted that the lands are annually leased out. The fact that the same rates continued in the leases does not show that the arrangement of 1869 was a permanent one. In this view, the question as to whether a trustee can make permanent alienations of trust property by granting perpetual leases does not really arise for consideration, though Mr. Venkatramana Rao for the respondents argues that, even if considered as a permanent arrangement—as his clients assert it to be—it is binding on the Estate inasmuch as it was introduced by the Court of Wards on account of extreme necessity. However, the question of law argued does not really arise for decision. The arrangement introduced by the Court of Wards has not been shown to be detrimental in any way to the interests of the trust; on the other hand, it appears that the revenues of the trust have really increased as a result of this measure. Since the arrangement is not a permanent one and has not been proved to be detrimental to the trust, the plaintiff is not entitled to a declaration that the settlement is not binding on him. His remedy, if he is so advised, will be to take appropriate proceedings to alter the prevailing rates if he can make out a proper case.

If the arrangement is to be regarded as a permanent one, then, according to the decision of this Court, the plaintiff's suit would be governed by Art. 144 of the Limitation Act—see *Vidya Varuthi* v. *Baluswami* (14), *Ranga Dasan* v. *Latchuma Dasan* (15) and *Rao Bahadur Govinda Rao* v. *Chinnathurai Pillai* (16) and it is in time, since the plaintiff attained majority in 1913 and the suit was instituted in 1916.

It follows from the findings given above that the plaintiff is not entitled to the declarations and the injunction that he has sought for in this case. The appeal must therefore be dismissed with costs.

N. S. *Appeal dismissed.*

14. (1921) I L R 44 M 831: 41 M L J 346.
15. (1924) 48 M L J 114.
16. (1925) 49 M L J 640.

[FULL BENCH]

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—SIR C. V. KUMARASWAMI SASTRI, *Kt.*, *Offg Chief Justice*, MR. JUSTICE KRISHNAN, MR. JUSTICE RAMESAM, MR. JUSTICE VENKATASUBBA RAO AND MR. JUSTICE CURGENVEN.

Pinnamameni Basava Sankaram (minor) by mother and guardian Rattamma... *Appellant* in both (1st Respondent in S. A. Nos.* 100 *and* 101 *of* 1923 *on the file of the High Court—Pltff.)*

v.

Garapati Narasimhulu and others ... *Respondents (Appellants in both* 1 *to* 3 *and Respondents* 2 *and* 3 *in do. Defendants* 3 *to* 5, 1 *and* 2).

F. B.
Sankaram
v.
Narasimhulu.

Insolvency—Hindu father—Adjudication of—Sale by Official Receiver prior to vesting order—Validity of—Subsequent order of vesting—Effect of—Official Receiver if agent of Court—Doctrine of ratification—Transfer of Property Act, S. 43—Applicability—Rights of purchaser.

A Hindu father applied on 24th January, 1918 to the District Court of Kistna to be adjudged insolvent. On 31st January, 1918 the petition was "transferred to the Official Receiver for disposal" and the petitioner was adjudged insolvent on 15th July, 1918. Thereafter on 25th August, 1918 the Official Receiver sold certain properties in auction, and duly executed a sale deed. The son of the insolvent sued the Official Receiver and the purchaser for a declaration that the sale was invalid, and for partition and delivery of his share in the properties. No order vesting the properties in the Official Receiver had been passed up to then, but pending the suit the District Judge passed on 1st February, 1921 an order as follows.—"The Official Receiver of Kistna is appointed Receiver for the properties of the insolvent with effect from the date of adjudication." *Held,* (1) the Official Receiver is not an agent of the Court for the purpose of the sale and hence a sale effected prior to the passing of the vesting order cannot be validated on the principle of ratification; but (2) though the sale was invalid at its inception, by virtue of the vesting order dated 1st February, 1921 the Official Receiver acquired an interest in the properties and the purchaser would acquire a valid title under S. 43 of the Transfer of Property Act.

Per Krishnan, J. (dissenting):—S. 43 of the Transfer of Property Act does not apply to a sale by an Official Receiver and the sale is invalid.

Appeal under cl. 15 of the Letters Patent against the judgment of the Hon'ble Mr. Justice Devadoss, dated 8th September, 1924 in S.A.Nos. 100 and 101 of 1923, preferred to the High Court against the decrees of the Court of the Subordinate Judge of Masulipatam in A.S.No. 1344 of 1922 preferred against the preliminary and final decrees of the Court

*L P A Nos. 125 and 126 of 1924. 13th August, 1926.

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of the Additional District Munsif of Gudivada in O.S.No.159 of 1920.

V. Ramadoss and *V. Krishna Mohan* for appellant.

S. Varadachariar and *N. Rama Rao* for respondents.

The Court delivered the following

Kumaraswami Sastri, Offg. C. J.

JUDGMENTS :—*The Officiating Chief Justice* :—This is an appeal against the judgment of Devadoss, J., in S.A. No. 100 of 1923. The 2nd defendant applied to the District Court of Kistna to be adjudicated an insolvent on the 24th of January, 1918. On the 31st of January, 1918 the District Court transferred the petition to the Official Receiver, the 1st defendant. The adjudication order was made on the 15th of July, 1918 and the Official Receiver put the property in dispute to sale at an auction held on the 25th of August 1918, and executed a sale deed on the 12th of September, 1919. Defendants 3 to 5 are the purchasers under the sale deed. The plaintiff who is the son of the 2nd defendant sued for a declaration that the sale by the Official Receiver is invalid, and for a partition and delivery to him of his share. He alleged that the debts contracted by his father were for illegal and immoral purposes not binding on him and that even if the sale is valid his interest would not be affected. On the adjudication of the 2nd defendant no order vesting the properties in the Official Receiver was made as required by S. 16 of the Provincial Insolvency Act (III of 1907). The properties therefore vested in the Court in the absence of an express order vesting them in the Official Receiver. It is clear that before the order of adjudication which was passed on the 15th of July, 1918 neither the Court nor the Official Receiver could have sold the properties, and that immediately, after the adjudication was made the properties of the insolvent vested in the District Court. After the suit was filed the Official Receiver applied to the Court for a vesting order and an order was made on the 1st of February, 1921. The question which we have to decide is whether the order made long after the sale deed executed by the Official Receiver, who at the time of the execution of sale deed had no power to sell owing to the absence of a vesting order, validates the sale. The Act in force at the date of the filing of the application by the insolvent was Act III of 1907. S.16, cl. (2) of that Act provided that on the making of an order of adjudication the whole of the property of the insolvent with the exception of the items mentioned in the section shall vest in the Court or in a Receiver as

provided therein and shall become divisible among the creditors. This section is re-enacted as S. 28 of Act V of 1920 and the relevant clauses are 2 and 3. This is therefore not a case where the properties continued to remain in the insolvent but a case where after the adjudication order they vested in the Court and at the date of the sale they must be vested either in the District Court or in the Official Receiver if the vesting order was passed. It is not therefore that neither the Court nor the Receiver had the power to sell. One of them under the Act had the power to sell.

The sale by the Official Receiver is sought to be validated on two grounds, namely, that the Official Receiver being only an officer of the Court and the properties having vested in the Court, the sale by the Official Receiver must be treated as a sale by an authorised agent of the Court subject to ratification and that the vesting order passed subsequent to the sale had the effect of ratifying and validating the sale held by the Official Receiver. It is also contended that S. 43 of the Transfer of Property Act would apply to a case like the present and that even assuming that the Official Receiver sold without title the vesting order gave him a subsequent title which the purchasers could avail themselves of.

As regards the first contention, I do not think that the Official Receiver to whom the matter is transferred for disposal by the District Judge under the provisions of the Provincial Insolvency Act can be said to be an agent of the Court in respect of any acts done by him. The Official Receiver is an officer appointed by the Local Government under S. 19 of the Provincial Insolvency Act (III of 1907) and where a matter is transferred to him under the powers conferred by the Act he is an officer who acts not as an agent of the District Court but as a person who under the Act is invested with powers specified therein any more than a Court to which a decree is transferred for execution under the provisions of the Civil Procedure Code can be said to be the agent of the Court transferring the decree. There may be cases where there is something in the order of Court transferring the matter to the Official Receiver which limits his powers or which can be said to constitute him an agent but in the present case no such limitation exists. I do not think that the Official Receiver or the Official Assignee is an agent of the Court within the meaning of the Indian Contract Act so as to enable the Court to ratify any unauthorised acts done by the agent.

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The next question is whether S. 43 of the Transfer of Property Act would apply. In order to attract the provisions of S. 43 the sale should not fall within S. 2, cl. (*d*) of the Transfer of Property Act. S. 2, cl. (*d*) enacts that nothing contained in the Act shall be deemed to affect any transfer by operation of law or by, or in execution of, a decree or order of a Court of competent jurisdiction, except so far as is provided by S. 57 and Chapter IV of the Act. I do not think that a sale by the Official Receiver acting under the provisions of the Provincial Insolvency Act is a transfer of property by operation of law or by, or in execution of, a decree or order of a Court of competent jurisdiction. The order of Court under the Provincial Insolvency Act simply vests the property in the Official Receiver and on such vesting he is under the provisions of the Act entitled to deal with the property in the various modes specified in S. 20 of Act III of 1907, which corresponds to S. 59 of Act V of 1920. I may point out that both Ss.20 and 59 do not require any leave or order of the Court so far as the sale of property is concerned. It is only as regards cls. (*c*) to (*i*) that any leave is necessary. No authority has been cited for the proposition that a sale by the Official Receiver is a sale in execution of a decree or order of the Court and attracts the advantages and the infirmities attending Court sales. Reference has been made to *Gaya Prasad* v. *Baij Nath* (1) as authority for holding that the sale by the Official Receiver is a sale under an order of Court and S. 2, cl. (*d*) of the Transfer of Property Act applies. There the question arose under the Companies Act and the sale was by the Official Liquidator appointed under the Act who sold under orders of Court. The question whether such a sale would be a Court sale was left undecided. The learned Judges point out that without the order sanctioning the sale the defendant would have got no title from the Official Liquidator. In the present case there is no order of Court sanctioning the sale by the Official Receiver to the first respondent nor was any order necessary as the Act gave the Receiver full powers of sale. It seems to me that a sale by an Official Receiver acting under the powers conferred by the Act and without any leave or sanction of Court being necessary stands in the same position as a sale by a person in whom property vests by law for the purpose of administration of an estate subject of course to such protection as the law allows to judicial officers acting in execution of

1. (1892) I L R 14 A 176.

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their office. Though property vests in the Receiver by operation of law the transfer by him is a transfer by one party to another and cannot be said to be a transfer by operation of law in favour of his vendee. Viewing the same in this light, I am of opinion that the present case falls within S. 43 of the Transfer of Property Act. There is always an implied covenant by the vendor that he has title to sell. S. 55 contains implied covenants in sales of immoveable property and there can be little doubt that when a person sells property there is an implied covenant that he has power to sell. Even assuming that all that the Official Receiver can sell is the right, title and interest of the insolvent, still the Official Receiver covenants that he has authority to transfer such right, title and interest as the insolvent has. It is of course open to him by apt covenants to protect himself against any of the infirmities of title or any disputes which may arise as regards the sale. But in the present case it is not contended that the Official Receiver has done so. In the present case the Official Receiver who had no power to sell has sold the property. There is as regards the vendee who had no notice that no vesting order was passed and who was entitled to assume that the Official Receiver was clothed with the requisite authority, the implied covenant that he has title to sell and there is therefore an erroneous representation that he is authorised to transfer immoveable property, when as a matter of fact he had no such power. The transferees in this case paid consideration for and if the Official Receiver subsequently got authority to transfer the property there is no reason why such subsequent authority should not operate so as to validate the antecedent sale. The case comes strictly within the wording of S. 43. I may point out in this connection that in cases where after a sale it is sought to rectify any defects in the power of the Official Receiver it is desirable that notice should go to all the parties interested in the property and their objections should be heard as there may arise cases where it is undesirable that the Court should exercise its discretion when it is passing orders the effect of which would be to validate invalid transactions long afterwards and affect the right of third persons. In the present case there is no hardship shown.

As regards the plea that the debts were contracted by the father for illegal and immoral purposes no evidence has been adduced and the appellants' vakil does not want a remand for the determination of that question.

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I had some doubt whether having regard to the decision of their Lordships of the Privy Council in *Sat Narain* v. *Behari Lal* (2) the Official Receiver could sell the interest of the minor which did not vest in him under the guise of exercising the power which the father has. In the case of a father who is a member of a joint family with his sons the whole joint property vests in them jointly. This is not the case where the father becomes an insolvent and his interest only vests in the Official Receiver. But in view of the decision of the Full Bench in *Balavenkata Seetharama Chettiar* v. *Official Receiver, Tanjore* (3) I think the matter is concluded by authority.

The Letters Patent Appeal fails and is dismissed with costs.

Krishnan, J.

Krishnan, J. :—*L. P. A. No.* 125 *of* 1924 :—To understand the points raised in this appeal facts may be briefly stated as follows. One Muttayya applied in 1918 to be declared an insolvent to the District Court of Kistna. The District Judge passed the order "transferred to the Official Receiver for disposal" and did nothing else. The Official Receiver adjudicated Muttayya an insolvent and instead of remitting the case to the District Judge for orders appointing him Receiver of the properties and vesting them in him, very carelessly proceeded to sell the joint family property of Muttayya and his son, and the contesting respondents purchased it. Plaintiff has now brought the suit to have it declared that his half share in the property did not pass by the sale and to recover possession of it. While this suit was pending before the District Munsif the Official Receiver realising his mistake applied in 1921 to the District Judge for a vesting order having retrospective effect from the date of adjudication and he passed an order as follows :—

"The Official Receiver of Kistna is appointed Receiver for the properties of the insolvent with effect from the date of adjudication."

This order was passed without notice to any one three years after the adjudication.

We have to consider the effect of this belated proceeding on the Official Receiver's sale for it is contended that that order has validated the sale which admittedly was an invalid one at its date as the Official Receiver had no power to sell without a vesting order. A number of authorities have laid down in this Court that a sale without a vesting order is invalid

2. (1924) I L R 6 L 1: 47 M L J 857 (P. C).

3. (1926) 51 M L J 269 (F B).

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and the point must now be taken to be settled. The learned vakil for the respondent therefore wisely conceded the point.

There is no provision in the Insolvency Act to enable a Court to pass orders with retrospective effect and so far as the Judge's order purports to take effect retrospectively it is clearly bad. But the respondents contend that giving it effect as from its date it has validated the sale from that date. The argument is put in two ways. It was first argued that the Official Receiver in selling the property must be treated as having acted as an agent of the Judge and his want of authority was subsequently cured by the Judge's order which amounted to a ratification by the principal of the agent's unauthorised act. It was next argued that S. 43 of the Transfer of Property Act applied and as soon as the Official Receiver got authority to sell, the purchasers could take advantage of it and treat the sale to them as valid.

Taking the question of ratification first I am of opinion that the contention cannot be supported. Though it may be, as pointed out in *Subba Aiyar* v. *Ramaswami Aiyangar* (4), the Court could appoint an agent to sell, there is nothing on record in the present case to suggest that the Court did appoint the Official Receiver as such agent ; in fact he could not have done so. [See *Kavali Sankara Rao* v. *Ramakrishnayya* (5)]. Nor is there anything to show that the Official Receiver purported to act as the agent of the Judge. He purported to sell on his own authority under the powers given him by the Act. The fact that he misconceived his powers does not make him an agent. The theory of agency should not be introduced, in my opinion, unless there is some foundation for it on facts. The Official Receiver not being an agent and not having purported to act as an agent, there can be no valid ratification. It is clear law that unless the agent purports to act as such his action cannot be ratified by the principal. In this case there is the further difficulty that nothing appears in the Judge's vesting order implying any ratification of the sale or even to indicate that he knew of the sale. The plea of ratification must therefore be rejected.

Turning now to the argument based on S. 43 it seems to me with all respect that the section is not applicable to the present case. Taking the language of the section it has first to be made out that the Official Receiver made an erroneous representation that he was entitled to sell the suit property.

4. (1920) I L R 44 M 547: 40 M L J 209.
5. (1923) 46 M L J 184.

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The Official Receiver's sale is in my view in the nature of a Court-sale and so far as I can see there is no implied representation involved in it. In such sales there is no covenant for title. What the Official Receiver sells is merely the title of the insolvent if any and the purchaser takes what he can get. If the purchaser fails to get a title he does not thereby get any claim for damages against the Official Receiver as he would against a private seller. Compulsory sales *in invitum* by Courts or by its officers stand on a very different footing from private sales.

Again it was argued that the Transfer of Property Act was itself excluded from applying to such sales by reason of S. 2, cl. (*d*) of that Act. The words of the section applicable are "transfer by order of a Court of competent jurisdiction" leaving out the other words. I am inclined to think that the Official Receiver's sales come within these words. They are in the nature of Court-sales and their validity really depends on the order of the Insolvency Court vesting the property in the Official Receiver and thus authorising him to sell. The sale is a compulsory sale *in invitum* and the foundation of its validity is the order of Court. It is open to the Court to set aside a sale by Official Receiver. The Official Receiver is an officer of Court and acts as such in effecting sales and not as a private individual. The Act as its preamble shows really deals only with transfer of property by act of parties. A similar point was raised before the Allahabad High Court with reference to a sale by the Official Liquidator and their Lordships were inclined to apply cl. (*d*) to such a sale though they did not expressly decide it. No other authority has been cited to us on the point.

For the above reasons with all respect I would hold that S. 43 cannot be applied to this case. It may be mentioned in conclusion that though the plaintiff raised the plea that his father's debts were illegal and immoral he adduced no evidence in support of it.

Having come to the conclusion that the Official Receiver's sale was invalid and it has not been validated in any way I hold that the plaintiff's suit should have been decreed. I would therefore allow the Letters Patent Appeal and dismiss the Second Appeal to the High Court with costs in both.

L. P. A. No. 126 of 1924 follows.

Ramesam, J.

Ramesam, J. :—This is a Letters Patent Appeal from the order of Devadoss, J., in S.A.No.100 of 1923. The 2nd defendant applied to be adjudicated an insolvent on the 24th

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of January, 1918. The petition was referred for disposal on 31st January, 1918 to the Official Receiver of Masulipatam who is the 1st defendant. The 2nd defendant was adjudicated an insolvent on the 15th of July, 1918. The Official Receiver held an auction sale of the property on 25th August, 1918. Defendants 3 to 15 are the purchasers by separate sale deeds. The plaintiff is the son of the 2nd defendant. He sued for a declaration that the sale by the 1st defendant of the plaintiff's share of the property to defendants 3 to 15 is invalid and for partition and recovery of his share. When the 2nd defendant was adjudicated an insolvent no vesting order in a Receiver was made under S. 16 of the Act of 1907 under which the proceedings were taken. The result was that the whole property of the insolvent vested in the Court under S. 16, cl. 2 (*a*). It has been held in a series of decisions in this Court that an express vesting order must be made so as to vest the property in the Official Receiver and if no such order was made the property vests only in the Court. See *Official Receiver of Trichinopoly* v. *Somasundaram Chettiar* (6), *Rama Aiyar* v. *Official Receiver of Tinnevelly* (7), *Vythilinga Padayachi* v. *Ponnuswami Padayachi* (8), *Kavali Sankara Rao* v. *Ramakrishnayya* (5), *Sankaranarayana Pillai* v. *Rajamani* (9), *Muthuswami Swamiar* v. *Somoo Kandiar* (10) and *Subba Aiyar* v. *Ramaswami Aiyangar* (4). In the decision in *Muthuswami Swamiar* v. *Somoo Kandiar* (10) Seshagiri Aiyar, J., seems to have come to the conclusion with great hesitation and gave no reasons in support of the conclusion, being merely content not to dissent from the other Judge. In that case, the adjudication was made by the Official Receiver In *Subba Aiyar* v. *Ramaswami Aiyangar* (4) also the petition was for adjudication and for the administration of the estate. The Receiver made the adjudication but no order was made by the District Judge vesting the property in the Receiver. The learned Judges, however, held that the words 'for the administration of the estate' amounted to appointing the Official Receiver an agent of the Court. Whether that case was correctly decided or not, in the present case the petition was merely referred to the Official Receiver for disposal, that is for adjudication or

4. (1920) I L R 44 M 547: 40 M L J 209
5. (1923) 46 M L J 184. 6. (1916) 30 M L J 415.
7. (1917) 32 M L J 520. 8. (1920) 41 M L J 78.
9. (1923) 46 M L J 314.
10. (1920) I L R 43 M 869: 39 M L J 458.

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not as the case may be. It cannot be held that the disposal of an application for adjudication involves the administration of the estate by the Receiver, especially when the Receiver cannot deal with the estate until a vesting order has been made. The decision in *Subba Aiyar* v. *Ramaswami Aiyangar* (4) was distinguished in *Kavali Sankara Rao* v. *Ramakrishnayya* (5) in which the order was exactly the same as in the present case and it was held that the transfer of the petition for disposal cannot be construed as in *Subba Aiyar* v. *Ramaswami Aiyangar* (4). In the case in *Sankaranarayana Pillai* v. *Rajamani* (9) the Court itself made the order of adjudication and then passed the order "referred for further proceedings" and the learned Judges construed this to mean that the Official Receiver of the District should act as Receiver in the particular case and the matter was referred to him and therefore the order amounts to an order of appointment. Venkatasubba Rao, J., was also of the opinion that the Official Receiver may be regarded as having been constituted as agent of the Court as in *Subba Aiyar* v. *Ramaswami Aiyangar* (4).

It seems to me that the reasoning in *Sankaranarayana Pillai* v. *Rajamani* (9) does not help us in the present case as the order of reference to the Official Receiver was not made after the adjudication but the reference itself was for the purpose of adjudication. We cannot imply by the mere use of the word 'disposal' that it was intended to appoint the Official Receiver as the agent of the Court. Nor did the Official Receiver purport to act as the agent of the Court. The result is that the line of reasoning based upon the agency of the Receiver does not avail in this case. Mr. Varadachari for the respondent contended that the Court itself can rectify the defect in the original order by the later order it passed on 1st February, 1921 long after the sales and after the trial of this suit and eight days before judgment of the District Munsif. He relies on *Kala Mea* v. *Harperink* (11). I cannot think that case while showing that a Court may correct its own irregularities in some cases supports the proposition that an order made on 1st February, 1921 can date back and validate sales made in 1918. For this purpose the only argument that can be urged is by relying on S. 43 of the Transfer of Property Act. In my opinion it may be said in this case that the Official Receiver

4. (1920) I L R 44 M 547: 40 M L J 209.
5. (1923) 46 M L J 184.
9. (1923) 46 M L J 314.
11. (1908) I L R 36 C 323: 19 M L J 115 (P C).

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erroneously represented to the purchasers that he was authorised to transfer the properties in the suit. There is no doubt that he also professed to transfer the properties for consideration. I also think that sales by Official Receiver will be covered by S. 43 and will not fall under the exemption clause, S. 2 (*d*) which relates to transfers by operation of law, and transfers by a decree or order and transfers in execution of a decree or order. The only obstacle that remains in the way of the respondent is whether the words "any interest which the transferor may acquire in such property" in S. 43 will cover the right of a Hindu father to sell the whole joint family property which vests in the Official Assignee according to our judgment in *Balavenkata Seetharama Chetti* v. *Official Receiver, Tanjore* (3). I think the words "any interest in such property" are wide enough to cover the right of a Hindu father to sell the whole of the joint family property and are, if at all, wider than the word "property" in S. 2 (*d*) of the Provincial Insolvency Act which, according to our construction, will include such power. On this last ground I am therefore inclined to hold, agreeing with Devadoss, J., that the appeal must be dismissed with costs.

Venkatasubba Rao, J.

Venkatasubba Rao, J. :—It has been held by a Full Bench of this Court in *Balavenkata Seetharama Chetti* v. *Official Receiver, Tanjore* (3) that the conditional power of a Hindu father to dispose of his sons' interest vests in the Official Receiver, and that decision governs the present case so far as this point is concerned.

A further contention has in this appeal been raised that the sales by the Official Receiver are bad by reason of the fact that when he effects the sales there was no order in virtue of which the property vested in him. The following dates are material. The 2nd defendant applied to be adjudicated insolvent on the 24th January, 1918. His petition was forwarded for disposal to the Official Receiver on 31st January, 1918. The Receiver adjudicated him insolvent on 15th July, 1918. The properties were sold by auction on 25th August, 1918 and sale deeds were executed by the Receiver in favour of defendants 3 to 5 on 12th September, 1919. The vesting order was made by the Court on 1st February, 1921.

This case has to be decided with reference to the Provincial Insolvency Act (III of 1907). Under S. 18 (1) the Court may at the time of the adjudication or at any time thereafter appoint a Receiver for the insolvent's property and

3. (1926) 51 M L J 269 (F B).

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thereupon such property vests in the Receiver. There being no order appointing a Receiver, the question of vesting in a Receiver cannot arise. When the order of the 31st January, 1918 was made the insolvent had not been adjudicated and the Court could not therefore then appoint a Receiver for the property of the insolvent. The order of the 31st January cannot accordingly be construed as appointing the Official Receiver by implication Receiver of the insolvent's property Then, can it be said, as has been contended by Mr. Varadachari, that the Official Receiver was the agent of the Court for the sale of the property? I do not think that on the facts of the present case, the theory of agency can be upheld. Under S. 16 (2) (*a*), on the making of an order of adjudication, if the insolvent's property does not vest in the Receiver it vests in the Court. On 31st January, 1918 when the petition was forwarded to the Official Receiver an order of adjudication had not been made and the property therefore did not vest in the Court, and it is thus difficult to accept the argument that the Official Receiver was intended to be constituted the Court's agent for the sale of the property. Moreover, the words of the order 'forwarded to the Official Receiver for disposal' clearly show that the functions which the Official Receiver was to exercise were delegated judicial functions under S. 52 and have no reference to the administration under S. 20 of the insolvent estate. For these reasons, *Sankaranarayana Pillai* v. *Rajamani* (9) and *Subba Aiyar* v. *Ramaswami Aiyangar* (4) do not apply to the facts of the present case. It was next suggested that the Court by making the vesting order, dated 1st February, 1921 should be deemed to have ratified the unauthorised sales. The question of ratification does not arise as the Official Receiver did not purport to act on behalf of the Court. The contention of Mr. Varadachari based on the ground of agency thus fails.

It is next contended, that although the transfer was inoperative at the outset, it afterwards became operative under S. 43 of the Transfer of Property Act.

It runs thus:—

"Where a person erroneously represents that he is authorised to transfer certain immoveable property and professes to transfer such property for consideration, such transfer shall, at the option of the transferee, operate on any interest which the transferor may acquire in such property at any time during which the contract of transfer subsists."

4. (1920) I L R 44 M 547: 40 M L J 209.
9. (1923) 46 M L J 314.

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"Nothing in this section shall impair the right of transferees in good faith for consideration without notice of the existence of the said option."

When the Official Receiver sold the properties in 1919 he had no interest in them and was therefore not competent to convey them; but in virtue of the vesting order, dated 1st February, 1921, he acquired an interest and the transfer operates under S. 43 on that interest without any further act on the transferor's part. This is the contention and in my opinion it seems to be sound and must be accepted. The section embodies a rule of equity that when a transferor purports to convey a property to which he has no title, the transferee must be satisfied out of any title which the transferor may afterwards acquire in the same property. All the requirements of the section are here fulfilled. There was an erroneous representation by the Official Receiver that he was authorised to transfer the property. There was no order appointing him a Receiver and the property had not vested in him. Believing he had the right to deal with it he conveyed the property. The representation was, of course, not express, but express representation is not necessary under the law. Representation of ownership was implied in the very act of transferring the property and such an implied representation is sufficient for the purposes of the section. *Angannayya* v. *Daroor Narasanna* (12) and Shephard and Browne's Transfer of Property Act Commentaries to S. 43. It was next contended that S. 43 does not apply, because the preamble to the Transfer of Property Act states that the object of enacting it was to define and amend the law relating to the transfer of property by act of parties and it is suggested that the act of the Official Receiver does not fall within the description of "act of parties". I find this to be a fallacious argument. The expression "by act of parties" connotes that the scope of the Act is limited to voluntary transfers as distinguished from transfers by operation of law. When the property vests in a Receiver on insolvency there is a transfer by operation of law but when a Receiver transfers the property to an alienee, the alienation is a voluntary transfer and is as much an "act of parties" as any transfer by a private individual. Section 2 (*d*) of the Transfer of Property Act is next relied on as furnishing an argument against the application of S. 43. The material portion of S. 2 (*d*) reads thus :—

"But nothing herein contained shall be deemed to affect any transfer by operation of law or by, or in execution of, a decree or order of a Court of competent jurisdiction."

12. (1907) 18 M L J 247.

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This provision makes it clear that transfers by operation of law do not come within the scope of the Act, but, as I have said, the sales in question are not such transfers.

It is next obvious that these sales are not transfers in execution of a decree or order of a Court of competent jurisdiction. Then remains the only other part of the section. Are these sales transfers by a decree or order of a Court? It is impossible to regard these as such. There is, in the present case, no decree or order which may be said to have the effect of transferring these properties. Section 2 (*d*) does not stand in the way. Next, it is said that the section does not apply to sales forbidden by law on the ground of public policy. This is not such a sale and this argument is equally untenable. It is lastly contended that S. 43 does not prevent the insolvent's sons from attacking the sale. I am unable to follow this argument. The section refers to transfer of immoveable property. What the Receiver transferred was undoubtedly immoveable property. In so transferring immoveable property he exercised the Hindu father's power to dispose of his sons' shares. The question is, what is that that he transferred? Whether in his capacity as the assignee of the insolvent or as exercising the insolvent's power of disposal, what the Receiver actually did was to transfer immoveable property. That is all that the section requires and I do not see how if the Receiver is bound by the transfer, the sons are not. I may take an illustration for showing how misleading the argument of the learned vakil for the insolvent's son is. Let us take a simple case of the father himself transferring the property. Let us assume that the father acquires a property by purchase as joint family property. Soon after its acquisition the father sells it for justifiable purposes. It is subsequently found that on the date of the transfer by the father, his title was defective as he had not taken, say, a release from some party with an outstanding title. When the defect is discovered it is cured by the father taking the necessary release deed. Can it be said that the sons in this case can take advantage of their father's defect of title and contend that the property has not passed to the transferee? Similar instances may be given of cases of ward and guardian or beneficiary and trustee. In these cases it is impossible to uphold the contention that while the law forbids the actual transferor to rely upon his own defect of title, a third party for whom the transferor acts can however defeat this equitable rule and

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commit a fraud. I am clearly of the opinion that S. 43 applies and I therefore accept the contention based on that section.

Another point has been urged by Mr. Varadachariar, namely, that the Court is bound to set right its own mistake and for this he relies upon the very strong observations of Lord Macnaghten in *Kala Mea* v. *Harperink* (11). I am not prepared to say that this contention is unsound, but I refrain from expressing any opinion at present on that point.

The appeal fails and is dismissed with costs.

L. P. A. No. 126 of 1924 follows.

Curgenven J

Curgenven, J. :—I agree that the order of 31st January, 1918 was not a vesting order, if only for the reason that under S. 56 of the Provincial Insolvency Act the Court cannot pass such an order before the order of adjudication is passed.

Three separate lines of argument have been employed to support the position that the Court can validate its Official Receiver's sale by passing a subsequent vesting order. The first is that if the property does not vest in the Receiver it vests in the Court, and, the Receiver being an officer of the Court, we may regard Court and Receiver as one, and an act done by either as done by that single agency. The second argument would make the Receiver the Court's agent, thus enabling the Court to ratify an act under S. 196 of the Indian Contract Act. The third argument is based on S. 43 of the Transfer of Property Act.

I do not think it necessary to discuss the merits of the first and second arguments, because it appears to me clear that the case may be brought under S. 43 of the Transfer of Property Act. That section is a branch of the Law of Estoppel, and the first requisite is that the transferee should have been misled into the impression that his transferor had title to transfer. It appears to me that where an Official Receiver sells the property of an insolvent, it may be presumed without more that a purchaser erroneously believed him to have authority to do so, and it is not necessary in order that such purchaser may be protected under S. 43 that he should have instituted any further inquiries. The section itself contains nothing which would make it inapplicable to a sale by a public servant, but reliance has been placed on the terms of S. 2 (*d*) and, should any ambiguity be found therein, of the preamble. Section 2 (*d*) provides that nothing contained in the Act shall be deemed to affect "any transfer by operation of law or by, or in execution of, a decree or order of a Court

11. (1908) I L R 36 C 323: 19 M L J 115 (P C).

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of competent jurisdiction.........." No difficulty seems to be presented by the words "transfer by operation of law" which, however widely they may be construed, cannot cover a sale by a Receiver of an insolvent's property. Such a sale is frequently a matter of discretion and so a voluntary act on the part of the Receiver, as the purchase is on the part of the buyer, and, although the Receiver may be a public officer, the transaction is not the less an act of parties on that account. The ordinary rules relating to stamps and registration apply to such sales.

The next phrase to be considered is "by a decree or order of a Court of competent jurisdiction". It would, I think, be a misuse of language to say that a sale was by order of the Court for the mere reason that the Court had passed a vesting order in respect of the whole assets. An Official Receiver is not required to obtain the Court's sanction before selling any portion of the property, nor is such sale subject to the Court's confirmation. There is an Allahabad case *Gaya Prasad* v. *Baij Nath* (1) in which the question was raised but not decided, whether a sale by the Official Liquidator, in the process of winding up a company, fell within S. 2 (*d*) of the Transfer of Property Act, but since the learned Judges observe that without the order sanctioning the sale the defendant would have got no title from the Official Liquidator, I infer that there was a specific order of Court sanctioning that particular sale. If that was so, the argument for excluding such a sale from the provisions of the Act would be stronger than where only a general vesting order has been passed. Nevertheless, enough doubt was felt for the Bench to add the advice that Official Liquidators who take leases and subsequently as such liquidators sell the interest of the lessee had better, for their own protection and to avoid any question of their continuing liability, execute in favour of the purchasers written assignments of the leases and see that they are registered. In other words, they should observe the formalities required for a transfer by act of parties.

There remains to be considered the effect of the words "in execution of a decree or order of a Court of competent jurisdiction," and it would, I think, be unduly extending the meaning of these words to hold that a sale of property vested in the Official Receiver by order of the Court is in execution of that order. In one sense, no doubt, the sale is in pursuance of or "in execution of" the order, since such an order

1. (1892) I L R 14 A 176.

has ordinarily in contemplation a realisation of assets by sale. But attaching to " execution " the meaning which it bears in relation to judicial proceedings, I conclude that such a sale falls outside the scope of the exception. I agree therefore that the appeals must be dismissed with costs.

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T. S. V. ——— *Appeals dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE PHILLIPS AND MR. JUSTICE MADHAVAN NAIR.

Sundaramma ... *Appellant** (*1st respondent in S. A. No.* 318 *of* 1922 *on the file of the High Court—1st defendant*)

v.

Venkatasubbier and others ... *Respondents* (*Appellant and respondents* 2, 3 *and* 4 *in do.—Plaintiff and defendants* 2, 3 *and* 4).

Sundaramma v Venkatasubbier.

Hindu Law—Adoption—Wife of the adoptive father dead at the time of adoption—Adopted boy whether becomes her legal heir.

The adopted son of a person whose only wife had died before the adoption becomes the son of that wife so as to be her legal heir and can inherit to her relations.

Appeal under cl. 15 of the Letters Patent against the judgment of the Hon'ble Mr. Justice Devadoss, dated the 30th September, 1924 in S. A. No. 318 of 1922† preferred to the High Court against the decree of the District Court of Salem in A. S. No. 207 of 1920 preferred against the decree of the Court of the District Munsif of Krishnagiri in O. S. No. 122 of 1919.

C. V. Anantakrishna Aiyar for appellant.

V. Govindarajachari for *A. Krishnaswami Aiyar* for respondents.

The Court delivered the following

JUDGMENTS :—*Phillips, J.* :—The question in this appeal is whether the adopted son of a man whose only wife had died before the adoption becomes the son of that wife so as to be her legal heir. This question does not seem to have been directly decided in any case and therefore it will be necessary to see how far the authorities support the proposition. In the first place it is necessary to consider the principles which govern adoption under the Hindu Law. In *Uma Sunker Moitro* v. *Kali Komul Mozumdar* (1) Romesh Chander Mitter, J. observes :—

Phillips, J.

*L P A No. 129 of 1925. 12th March, 1926.

† Reported in 48 M L J 126.

1. (1880) I L R 6 C 256 (F B).

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Phillips, J.

"The theory of adoption depends upon the principle of a complete severance of the child adopted from the family in which he is born, both in respect to the paternal and maternal line, and his complete substitution into the adopter's family, as if he were born in it."

This theory has been upheld by the Privy Council in *Nagindas Bhugwandas* v. *Bachoo Hurkissondas* (2). The theory then appears to be that the adopted boy by a legal fiction becomes the natural son of the adoptive father and presumably also of his wife. The question here is not complicated by the existence of two or more wives. In *Narasimha Appa Rao* v. *Parthasarathy* (3) their Lordships of the Judicial Committee observe : "Only one wife can receive the child in adoption so as to step into the position of being its adoptive mother" and again "to hold that a child could bear such a relationship to more than one mother would be entirely contrary to settled law." This conclusion appears to be based on the theory of adoption, namely, that the adopted son becomes the natural son of the father, and the only way in which he can be deemed to be the natural and legitimate son of his father is by a fiction that he is the son of that father's wife also. A Hindu son has to offer oblations not only to his father's ancestors but also to his mother's ancestors. When, therefore, he is adopted into a new family, he becomes the son of that family and presumably he would offer oblations not only to his adoptive father's ancestors but to his father's wife's ancestors as well. It would be straining the legal fiction of adoption too far to hold that the boy need have no mother at all, although this may possibly be necessary in the case of an adoption by a bachelor, but that is an exceptional case with which we are not concerned now. In a family in which there were two wives, it was held that the wife who joined with the father in making the adoption although the junior wife was the mother of the boy in preference to her senior co-wife. *Annapurni Nachiar* v. *Collector of Tinnevelly* (4). This was upheld by the Privy Council in *Annapurni Nachiar* v. *Forbes* (5). Wherever possible therefore a mother should be found for the boy and the fact that such a mother died before the adoption can be no obstacle in view of the fictitious character of the whole principle of adoption.

2. (1915) I L R 40 B 270 at 288 : 30 M L J 193 (P C).
3. (1913) I L R 37 M 199 at 220 : 26 M L J 411 (P C).
4. (1895) I L R 18 M 277 : 5 M L J 121.
5. (1899) I L R 23 M 1 : 9 M L J 209 (P C).

It is contended for the respondent that even when the adoptive father's wife is alive she does not become the adoptive mother unless she actively participates in the adoption by receiving the adopted boy. This contention is apparently based on the literal meaning of the word *"prathigrahitha"* which is ordinarily translated as adoptive. Its literal meaning is " receiving " and it is contended that unless the boy is actually received by the woman she does not become his adoptive mother. It is well settled that a man can adopt without the consent of his wife and even against her consent and in either case the adoption is valid. If the adoption is valid and the principle is recognised that the adopted boy ought in theory to have a mother, it is difficult to accept the proposition that he is not to have any mother at all unless she actually receives him in adoption. The argument that the wife becomes the adoptive mother is based on the text of Nanda Panditha in Dattaka Mimamsa, Part I, verse 22 :—

"In consequence of the superiority of the husband by his mere act of adoption, the affiliation of the adopted, as son of the wife, is complete in the same manner as her property in any other thing accepted by the husband."

In this text there is no qualification of the words 'son of the wife' such as is sought to be put upon it by the respondent. He contends that it only means son in a tertiary sense, as laid down by Sarkar Sastri in his commentary on Adoption (page 227). When pressed for an interpretation of this tertiary sense, the learned vakil had to adopt the conclusion in Sarkar Sastri's book, namely, that he was not really a son for any purpose. This seems to be a quite unnecessary deduction for it destroys the apparent meaning of the text. If he is not really the son of the wife in any sense, why should the text declare that his affiliation as such is complete. No doubt Sarkar Sastri in his commentary supports the proposition put forward for the respondent, but there are very many contradictory statements to be found in his commentary. For instance, his observations at page 200 are altogether contradicted by those at page 419E. Apart, therefore, from this commentary, there appears to be no authority for the proposition that the wife does not become the adoptive mother unless she actually receives the boy. It may also be observed that it is only in very rare cases that the wife receives the boy as well as the father, and consequently in most cases if this contention were to be upheld, the result would be that an adopted son who was adopted by the father would have no mother at all, for admittedly he is no longer considered to be the son of his natural mother and consequently he would be

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in this anomalous position of a man who has no mother at all. If this anomalous position of a man without a mother can be avoided, I think it should be as being opposed to law of nature to which the theory of adoption is assimilated. The text of Dattaka Mimamsa is undoubtedly an authority to the contrary. I may observe that the late Sir Bhashyam Aiyangar J., accepted this proposition in an article in 9 M. L. J. 231 and there appears to be no reason why it should not be adopted. If, therefore, the wife becomes the adoptive mother whether she takes part in the ceremony or not, then there can be little difficulty in pressing the fiction a little further so as to include the deceased wife of the adoptive father. The whole theory being a fiction, the impossibility of a woman becoming the mother after her death must be explained away by the fictitious nature of adoption. As her consent is not necessary, the fact that the consent cannot be obtained after her death is immaterial. I would therefore hold that the deceased wife of the adoptive father can become the adoptive mother and the adopted son becomes her heir.

The learned Judge from whose decision this appeal is preferred has adopted the arguments of Sarkar Sastri in favour of his view, but as I have observed above, these arguments seem to be based on incorrect principles and an incorrect reading of the text. The appeal must therefore be allowed and the plaintiff's (respondent's) suit dismissed with costs throughout.

Madhavan Nair, J.

Madhavan Nair, J.:—The question for decision is whether an adopted son can inherit to the relations of the wife of his adoptive father when that wife was dead at the time of his adoption. Devadoss, J., answered the question in the negative, basing his judgment on the ground that "adoption being after the death (of his wife), it cannot be said by any fiction that she took part in the adoption." According to this view an adopted son can be heir only to the wife of the adoptive father who joins in the ceremony of adoption and who is termed "the receiving mother." The correctness of this view is challenged in this Letters Patent Appeal.

There is no direct authority on the point; but two texts in Dattaka Mimamsa have a bearing on the question. These are Dattaka Mimamsa, s. 1, verse 22, s. 6, verse 50 and are thus translated by Stokes:—

"In consequence of the superiority of the husband, by his mere act of adoption, the affiliation of the adopted, as son of the wife, is complete in the same manner as her property, in any other thing accepted by the husband."...

"The forefathers of the adoptive mother only are also the maternal grandsires of sons given and the rest for the rule regarding the paternal is equally applicable to the maternal grandsires (of adoptive sons)."

Respondent relies strongly on the latter of the abovementioned texts in support of his contention. This text shows that the relations of the adoptive mother only are the maternal relations of the adopted son. It is pointed out that the Sanskrit word "*prathigrahiyamatha*" corresponding to the term "adoptive mother" means "mother who accepts in adoption" and therefore, only the relations of a "receiving mother" are the maternal relations of the adopted son. It is difficult to accede to the argument that effect should be given to the literal meaning of the word "*prathigrahiyamatha*" and that it should be understood in the sense of physical acceptance by the mother; for, it is well known that the wife of the adopter is regarded as the adoptive mother even if she is not present at the adoption. The wife becomes the adoptive mother, not because she receives the boy in adoption but she is the wife of the adopter—her husband—who takes the boy in adoption. The context in which the passage occurs does not seem to require that the word should receive its primary meaning. The author mentions that the ancestors of the adoptive father are the paternal ancestors of the adopted son and then points out in the same way that the "forefathers of the adoptive mother only are also the maternal grandsires of the sons given, as distinguished from the ancestors of the natural mother. To illustrate this position there is no need to emphasise "acceptance" by the adoptive mother as a necessary feature in the ceremony of adoption. Sirkar Sastri in his "Tagore Law Lectures on Adoption" interprets the term "*prathigrahiyamatha*" literally. He says at page 419 "But it should be observed that although the husband's son is deemed by courtesy to be the wife's son, yet acceptance by the wife is absolutely necessary to constitute the husband's adoptee her legal son." *See* also page 237. These passages support the contention of the respondent. But the same learned author at page 200, para. 4 of the same volume expresses the following contrary view relied on by the appellant, "When the adopter is a widower, it might be said that his deceased wife's ancestors will be the maternal ancestors of the adopted son.' This opinion of Sirkar Sastri is therefore not very helpful in deciding this question.

In support of the theory that there should be a "receiving mother" to enable the husband to make a valid adoption, the

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learned Judge refers to *Annapurni Nachiar* v. *Collector of Tinnevelly* (4) but that was a case where a conflict arose between the two married wives of the holder of an impartible zemindari as regards the right to succeed to the impartible estate, the property of the infant adoptive son of their late husband. It was held that the junior wife having taken part in the adoption was entitled to preference over her co-wife who was not associated by the husband in the act of adoption. In the course of his judgment Mr. Justice Shephard points out that "Where, however, there are several wives it is said that the husband is at liberty to designate the one who shall take the place of mother, and that by this means the anomaly of assigning several mothers to the adopted son may be avoided." As regards the association by the husband of one of the wives in the act of adoption, the Privy Council in affirming the decision of the High Court observed thus:

"It certainly is a reasonable law that the head of a family should be able to take action likely to prevent disputes between his widows relative to adoption and the consequences of it. To unite one wife with himself in adopting is one way; and it is satisfactory to find that besides the one direct judicial decision there is so much reason and opinion in its favour and so little against it."

See *Annapurni Nachiar* v. *Forbes* (5). What has there been said as regards the 'acceptance' by one mother when there are several wives to the adopter does not lead to the conclusion that the "receiving mother" is necessary to validate the adoption by the husband. It is conceded that if the husband had only one wife the act of adoption inasmuch as it concerns him alone may be performed independently of her.

The first of the two texts referred to above does not in any way support the suggestion that the adoptive mother to have the same relation as the natural mother should be one who actually receives the boy in adoption. On the other hand, inferences drawn from it strongly support the appellant. It is undisputed that adoption can be made by the husband without the consent of his wife. It may be made even against her wishes; her association with the husband in the act of adoption is a religious formality which does not show any legal significance. "The ceremonial of adoption utterly ignores the wife, who need not be present and to whom no part is assigned if she is present" (Mayne's Hindu Law, page 229). When the adoption is made whether with or without her consent the wife becomes the adoptive mother of

4. (1895) I L R 18 M 277 : 5 M L J 121.
5. (1899) I L R 23 M 1 : 9 M L J 209 (P C).

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the child by the mere fact of adoption. Adoption is but a fiction in law. As observed by Mahmood, J., in *Ganga Sahai* v. *Lakhraj Singh* (6) "Adoption is itself a 'second birth' proceeding upon the fiction of law that the adopted son is 'born again' into the adoptive family by the rites of initiation." According to Hindu Law, an adopted son occupies the same position and has the same rights and privileges in the family of the adopter as the legitimate son .... The theory of adoption depends upon the principle of a complete severance of the child adopted from the family in which he is born, both in respect to the paternal and the maternal line, and his complete substitution into the adopter's family, as if he were born in it. [See *Uma Sunker Moitro* v. *Kali Komul Mozumdar* (1) quoted with approval in *Nagindas Bhugwandas* v. *Bachoo Hurkissondas* (2)]. As his adoption puts the adopted son in the place of a legitimate son as regards the rites of inheritance in the family of the adopter he must be considered to be heir to any rights arising after the adoption from his father's wife's position in his adoptive family, though she was not alive at the time of the adoption. To give full effect to the fiction of adoption and to assimilate the fact to an imitation of nature, the adopted boy should have a mother. I do not think it is impossible to conceive the deceased wife as the fictional mother of the adopted child. The theory of a "receiving mother" being discarded, I cannot find any difficulty in holding that the wife of the adoptive father though she was dead at the time of adoption can be considered as the adoptive mother.

It is true that when a bachelor adopts, the adopted boy can have no adoptive mother. Fiction cannot be made to assimilate to nature in that case. But there is no reason why we should extend that analogy to cases like the present when it is possible to give full effect to the fiction by ascribing the deceased wife of the husband as the adoptive mother of the child.

For these reasons, I hold that the Letters Patent Appeal should be allowed and the plaintiff's suit be dismissed with costs throughout.

N.S. *Appeal allowed.*

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1. (1880) I L R 6 C 256 at 259, 260 (F B).
2 (1915) I L R 40 B 270 at 288 : 30 M L J 193 (P C).
6. (1886) I L R 9 A 253.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE ODGERS.

David Cutinha ... *Appellant** (*Plaintiff*)

v.

Salvadora Minazes and others ... *Respondents* (*Defendants Nos.* 1, 2, 4 *to* 13).

David Cutinha *v.* Salvadora Minazes.

*Landlord and tenant—Forfeiture—*Mulgeni *lease—Provision against alienation—*Mulgeni *lease of part of the property demised—Effect of—Landlord's right to claim forfeiture—Rule of construction.*

A *mulgeni* lease contained a provision that if the lessee was under necessity to alienate his rights, the same was to be surrendered to the plaintiff on obtaining the value of improvements and it was only in the event of the plaintiff refusing in writing to take the property that the rights could be alienated to others. Then followed a clause as to re-entry. The lessees alienated portions of the demised properties by granting a *mulgeni* lease and thereupon the plaintiff claimed to enforce his right of forfeiture. *Held,* the rule of construction applicable to such cases is that a forfeiture clause should be very strictly construed, and as the words of the lease do not contain any restriction on alienation of a portion of the demised premises, the landlord is not entitled to claim forfeiture. Case-law referred to.

The grant of a *mulgeni* lease is an alienation.

Second Appeal against the decree of the District Court of South Kanara in A. S. No. 239 of 1922 preferred against the decree of the Court of the Principal District Munsif of Mangalore in O. S. No. 110 of 1920.

J. A. Pinto for appellant.

B. Sitarama Rao for respondents.

The Court delivered the following

JUDGMENT :—This is a case which has taken some time to argue as it involves the question of forfeiture of a *mulgeni* lease. The lease is contained in a decree (Ex. A) of the 30th August, 1910. It sets out,

"If there is necessity to alienate the said *mulgeni* right and the right of improvements, the same should be surrendered to plaintiff only on receiving from him the value of improvements fixed by four wise men, and it should not be alienated to any other person by means of mortgage, sale, gift, etc., in any manner whatever. If the plaintiff refused in writing to take the property on paying the value of the improvements in that manner, the defendants may alienate the same to other persons. If in contravention to this, the defendants alienate their right, the said alienation and also the *mulgeni* right should be cancelled and the property should come under plaintiff's possession."

The alienations complained of consist of the grant of a *mulgeni* lease by some of the tenants and also the grant of a simple mortgage, Ex. J. Both the Lower Courts have held that none of these matters falls within the clause restricting alienation. The tenants, *i. e.*, the persons in possession at the

*S A No. 1701 of 1923. 25th August, 1926.

David Cutinha v. Salvadora Minazes.

present moment seem to be descendants of the original lessees and their alienees. Mr. Pinto for the appellant has strenuously argued that these lessees are entitled by arrangement among themselves to some kind of definite shares in the leased lands. The plaint, it is true, does allege, and in fact was obliged to allege that the defendants have alienated portions of the leased property. The plaintiff also alleges that by arrangement among themselves defendants 4 to 6 are in possession of a particular portion of the leased property. But he is careful to add that the said arrangement does not bind him. There is some allegation in the written statement that the rent was paid in shares. But in one of the written statements it is admitted that the *mulgar* is entitled to receive rent in one lump sum. This theory seems to have been started for the first time in this Court and there seems to be no evidence and no finding in either of the Lower Courts that the *mulgar* ever recognised this division or partition, or whatever it may be called, among these Indian Catholics.

A distinction has been attempted to be applied by Mr. Pinto in considering cases which I shall shortly notice. It is an axiom of the law that a forfeiture clause should be very strictly construed. As long ago as 1808 in *Church* v. *Brown* (1) Lord Chancellor Eldon said:

> "These covenants having been always construed by Courts of Law with the utmost jealousy to prevent the restraint from going beyond the express stipulation."

It is admitted and indeed found by the Lower Appellate Court that these alienations have been not only of portions of the leased property, but even adopting what I may call the partition theory, extend only to a portion of the defendants' share. That I think at once distinguishes the case from the well-known case of *Varley* v. *Coppard* (2), which was a case of assignment to a partner and the case of *Langton* v. *Henson* (3), which is a similar case of assignment between partners. There is ample authority in the English Law and in fact in the law here too to show that unless there is a restriction against the assignment of any portion of the demised property, the restraint on the alienation of the demised premises will not prevent the alienation of a portion. I am not impressed with the reasoning of the learned District Judge as to the grant of a *mulgeni* lease not being an alienation. It clearly is an alienation. But I think that the respondents

1. (1808) 15 Ves 258 at 265. 2 (1872) 7 Com Pleas 505.
3. (1905) 92 L T 805.

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must succeed on the ground that the restriction on alienation of a portion of the demised premises is not contained in the words of the lease which I have set out above. It is perhaps not necessary to multiply examples, but there are some cases which have been cited and which lend support to the contention for the respondent, for instance, in *Grove* v. *Portal* (4). Joyce, J. quotes the passage already cited from *Church* v. *Brown* (1) and says that the dictum of the Lower Court has never been disapproved of; and again in *Russell* v. *Beecham* (5) Scrutton, L. J. says quoting Lord Eldon again that " a covenant not to part with possession of premises would not restrain the tenant from parting with a part of the premises, these covenants having been always construed by Courts of Law with the utmost jealousy to prevent the restraint from going beyond the express stipulation." In *Chatterton* v. *Terrel* (6) Lord Wrenbury says—

"It is said and said with truth, that if there be a covenant not to assign or underlet the premises, it is not a breach to assign or sub-let part of the premises. It was not so stipulated, if those be the words, for the words 'or any part thereof' are not found in the covenant."

See also *Venkataramana Bhatta* v. *Krishna Bhatta* (7). The covenant here, I think, does not restrain the alienation of a portion or portions of the property. In that view the decree of the Lower Appellate Court was right.

This Second Appeal must be dismissed with costs.

T. S. V. *Appeal dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE RAMESAM.

Mir Mahomed Noorulla Sahib . . *Appellant** (*Plaintiff*)

v.

Hasarath Kibulai Sayyad Ghulam Ghouse Sha Sahib Kadiri Avergal . . . *Respondent* (*1st defendant*).

Mahomed Noorulla Sahib v. Sayyad Ghulam Ghouse Sha Sahib.

Limitation Act, Art. 182, cl. 5—"Proper Court"—Transfer of decree to the District Court—Return of the decree by the District Court after six months under R. 161, cl. (a) of the Civil Rules of Practice—Application for execution to the District Court after the return of the decree—Whether one made to a proper Court—Civil Rules of Practice, R. 161 (a)—Whether ultra vires*—Civil Procedure Code, S. 41—Failure to execute the decree—Decree-holder doing nothing for seven months after the transfer of the decree to another Court.*

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*A A A O No. 14 of 1925. 19th August, 1926.

1. (1808) 15 Ves 258. 4. (1902) 1 Ch D 727.
5. (1924) 1 K B 525 at 536. 6. (1923) A C 578 at 585.
7. (1924) 47 M L J 307.

Mahomed Noorulla Sahib v. Sayyad Ghulam Ghouse Sha Sahib.

A decree was transferred by the Court which passed it to the District Court of Tanjore. After waiting for six months, the District Court returned the decree to the Court which passed it under R. 161 (*a*) of the Civil Rules of Practice with a certificate that the decree-holder did not apply for execution within six months from the date of the receipt of the decree by that Court. The decree-holder applied to the District Court for execution subsequent to the return of the decree by that Court.

Held, that the execution application to the District Court after it had returned the decree under R. 161 (*a*) of the Civil Rules of Practice was not one presented to the "proper Court" within the meaning of Art. 182, cl. (5) of the Limitation Act. *Velliappa Chettiar* v. *Subramaniam Chetty,* (1915) 39 M 485: 29 M L J 172 distinguished.

Rule 161 (*a*) of the Civil Rules of Practice is not *ultra vires.* All the rules of the Civil Rules of Practice are supplemental to the Civil Procedure Code.

Dictum of Seshagiri Aiyar, J., to the contrary in *Velliappa Chettiar* v. *Subramaniam Chetty,* (1915) 39 M 485: 29 M L J 172 disapproved.

Where a decree-holder does nothing for seven months after the decree is transferred to another Court, it is a failure to execute the decree within the meaning of S. 41, Civil Procedure Code. *Abda Begam* v. *Muzaffar Husein Khan,* (1897) 20 A 129 and *Vithu* v. *Ganesh,* (1923) 25 Bom L R 453 distinguished.

Appeal against the order, dated 24th April, 1924 of the District Court of West Tanjore at Tanjore in A. S. No. 159 of 1923 preferred against the order, dated 6th April, 1923 of the Court of the Subordinate Judge of Tanjore in E. P. No. 40 of 1923 in O. S. No. 44 of 1923.

M.S.Vaidyanatha Aiyar and *T.S. Srinivasan* for appellant.

T.R.Ramachandra Aiyar and *S. Muthiah Mudaliar* for respondent.

The Court delivered the following

JUDGMENT :—This is a second appeal arising in execution. The decree was obtained in the Sub-Court of Tanjore. The decree-holder applied to have it transferred to the District Court on 25th February, 1926 and it was so transferred. After waiting for six months the District Court returned the decree with a certificate that the decree-holder did not apply for execution, on 11th September, 1918. Apparently, in ignorance of this fact, the decree-holder applied to the District Court on 8th January, 1919, when he was informed that the decree had already been returned under R. 161 (*a*) of the Rules of Practice. The next petition filed was in the Sub-Court on 12th April, 1921. He was asked how it was in time, but he did not represent it with the information. The present application was filed on 8th February, 1923. The Courts held that it was barred. The decree-holder appeals.

Mahomed Noorulla Sahib v. Sayyad Ghulam Ghouse Sha Sahib.

If the application of January, 1919 was in time, then the application of April 1921 was also in time ; then the present application also would be in time. The question therefore reduced itself to this, whether the application of January, 1919 was in time. This again depends upon whether it was presented to the proper Court. The decree-holder applied to the District Court after the decree had been returned by that Court. The case *Velliappa* v. *Subrahmanyam* (1) does not help the appellant. All that was held there was that where a Court to which a decree was transferred did not return the decree though six months have elapsed without an application for execution, then an application would still lie in that Court. But in this case the decree had been returned. Mr. Vaidyanatha Aiyar for the appellant argues that such a return is not a return within the meaning of S. 41 of the Code of Civil Procedure. I think it is. It seems to me that R. 161 (*a*) of the Civil Rules of Practice is only a rule of detail giving further guidance to Court in the carrying out of the provisions of S. 41, Civil Procedure Code. I do not think they are inconsistent with each other. I cannot therefore hold, as the appellant argues, that R. 161 (*a*) of the Rules of Practice is *ultra vires*. He relies on a remark, in the above decision of Seshagiri Aiyar, J., that the rule was not an adjunct to the Civil Procedure Code. I do not agree with this remark. I think all the rules of the Rules of Practice are supplemental to the Civil Procedure Code. It is a rule within the power of the High Court, the object being to compel decree-holders to be prompt in filing execution petitions in Courts to which the decrees are transferred ; and once a decree is returned by the Court to which it was transferred, it cannot be said that that Court is the proper Court. Mr. Vaidyanatha Aiyar argues that there is no failure to execute the decree within the meaning of S. 41. Nothing having been done for seven months, it seems to me it is a failure. He relies on the explanation of the word "failure" in *Abda Begam* v. *Muzaffar Husein Khan* (2) and *Vithu* v. *Ganesh* (3). I do not understand that the definition in these cases is quite an exhaustive definition of the word "failure". It does not appear that there was any Rule of Practice like R. 161 (*a*) at the time these cases were decided. Therefore any of these decisions cannot help us. The definition is only confined to the particular facts of those cases. I think the District Judge is right in the

1. (1915) I L R 39 M 485 : 29 M L J 172.
2. (1897) I L R 20 A 129.
3. (1923) 25 Bom. L R 453.

Mahomed Noorulla Sahib v. Sayyad Ghulam Ghouse Sha Sahib.

latter part of his judgment (which to some extent is inconsistent with the earlier part), where he holds that the District Court of Tanjore was not the proper Court after the decree was returned.

The decree is for a large amount and the result is no doubt hard on the appellant. But he must thank himself for the result and the law ought not to be made responsible for the result of gross laches on the part of the parties.

The appeal is dismissed with costs.

N.S. *Appeal dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE DEVADOSS.

Gollapalle Sidda Reddi (minor) by guardian and father Gangi Reddi and another ... *Appellants** (*Defendants*)

v.

Deva Jayarami Reddi (minor) by next friend, eldest mother Atchamma ... *Respondent* (*Plaintiff*).

Sidda Reddi v. Jayarami Reddi.

Limitation Act, Article 118—Applicability—Natural son—Suit by, for a declaration that the defendant was not the validly adopted son of his father and for an injunction restraining defendant from interfering with plaintiff's enjoyment of his property—Declaration merely incidental to injunction in such suit.

Held, that Art 118 of the Limitation Act was inapplicable to a suit brought by the natural son of *A* for a declaration that the defendant was not the validly adopted son of his (plaintiff's) father and for an injunction restraining the defendant from interfering with the enjoyment of the property belonging to the plaintiff.

Held further, that in such a suit the injunction prayed for was the main relief, and that the declaration sought was merely incidental to it

Second Appeal against the decree of the Court of the Subordinate Judge of Chittoor in A. S. No. 154 of 1922 (A. S. No. 188 of 1922 on the file of the District Court, Chittoor) preferred against the decree of the Court of the District Munsif of Madanapalle in O. S. No. 269 of 1921.

P. Chenchiah for *P. Venkataramana Rao* for appellants.

S. Varadachariar for respondent.

The Court delivered the following

JUDGMENT :—The only question in this second appeal is whether the plaintiff's suit is barred by limitation under Art. 118 of the Limitation Act. The contention of Mr. Chenchiah is that the adoption was made more than six

*S A No. 1600 of 1923. 30th July, 1926

Sidda Reddi v. Jayarami Reddi.

years before the date of the suit and that the father of the plaintiff who could have challenged the factum and validity of the adoption did not do so and the plaintiff's claim is barred by limitation, and he relies very strongly upon cases which relate to reversioners bringing suits for setting aside adoptions.

The plaintiff is the natural son of the adoptive father. The Appellate Court finds that there was no adoption. The case of the *aurasa* son of an adoptive father stands on a different footing from that of a reversioner. The cause of action is one and the same whatever may be the number of the reversioners. But the case of a person like the plaintiff is altogether different for the adoption affects him as it affects no one else for if the adoption is held valid his right to the family property would be cut down under the Hindu Law. But if the adoption is held to be not valid then he would succeed to the whole of the family property. That being so, it is difficult to see how cases which relate to suits by reversioners would apply to the case of the plaintiff.

As Mr. Varadachariar very well put it, if the appellant's contention is to hold good then in the case of a widow making an adoption if the adoption is not questioned by her within six years of the date of the adoption the adoption could not be impeached by anybody. Surely that is not the Hindu Law. The mere fact that the father who made the illegal adoption was alive for more than six years after the adoption would not bar the right of a son born a year or two after the adoption to question it. The plaintiff is still a minor and it is difficult to see how Art. 118 would apply to a case like this, for the cause of action begins from the time when the alleged adoption becomes known to the plaintiff. He, being a minor, could not be fixed with the knowledge of the adoption from the date of his birth. The contention is under S. 2 (8) of the Limitation Act, the plaintiff must be considered as a person claiming through his father. I am not prepared to accept this contention for the plaintiff's right is quite independent of that of the father. It is therefore unnecessary for me to consider the cases relied upon by Mr. Chenchiah, *Hari Prasad Singh* v. *Sourendra Mohan Sinha* (1), *Venkata Sivayya* v. *Addemma* (2), *Ayyadorai Pillai* v. *Solai Ammal* (3) and *Chiruvolu Punnamma* v. *Chiruvolu Perrazu* (4).

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1. (1922) I L R 1 Pat 506 at 521.
2. (1920) I L R 44 M 218 : 39 M L J 621.
3. (1901) I L R 24 M 405.
4. (1906) I L R 29 M 390 : 16 M L J 507.

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The suit is not for a mere declaration ; it is for an injunction as well. The relief as regards declaration is only incidental to the main relief, namely, the injunction prayed for. For, the allegation is that the defendants 1 and 2 are interfering with the enjoyment of the property belonging to the plaintiff and the Court is asked to grant a permanent injunction restraining them from doing so. That being so, I do not think that the suit is barred by limitation under Art. 118.

In the result the second appeal fails and is dismissed with costs of the plaintiff-respondent.

A. S. V. *Appeal dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE ODGERS AND MR. JUSTICE VISWANATHA SASTRI.

Mahalinga Naicker ... *Appellant** (*Plaintiff*)

v.

Vellaya Naicker *alias* Guruswami Naicker and another ... *Respondents* (*Defendants*).

Mahalinga Naicker v. Vellaya Naicker.

Madras Estates Land Act, Chapter VI—Sale held under—Suit by ryot to set aside—Civil Court—Jurisdiction—Application to set aside sale under S. 131 of Act—Effect—Civil Procedure Code, O. 21, R. 92(1)—Applicability to proceedings under Act.

A Civil Court has jurisdiction to entertain a suit brought by a ryot to set aside a sale held under the provisions of Chapter VI of the Madras Estates Land Act. The fact that the ryot made an unsuccessful application to set aside the sale under S. 131 of that Act does not affect the jurisdiction of the Civil Court to entertain the suit.

Per Viswanatha Sastri, J.:—O 21, R. 92 (1) of Civil Procedure Code does not apply to proceedings under the Estates Land Act.

Second Appeal against the decree of the Court of the Subordinate Judge of Ramnad at Madura in A.S.No. 74 of 1921 (A. S. No. 722 of 1919 of the District Court of Ramnad at Madura) preferred against the decree of the Court of the Additional District Munsif of Srivilliputhur in O. S. No. 430 of 1917 (O. S. No. 247 of 1917 on the file of the Court of the District Munsif of Sattur).

B.Sitarama Rao and *S.R.Muthuswami Aiyar* for appellant.

A. Venkatarayaliah and *L. Venkatanarasiah* for respondents.

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*S A No. 73 of 1925. 24th September, 1925.

Mahalinga Naicker v. Vellaya Naicker.

Viswanatha Sastri, J.

The Court delivered the following

JUDGMENTS :—*Viswanatha Sastri, J.* :—Plaintiff is the appellant. He sued to set aside a sale held under the provisions of Chapter VI of the Estates Land Act, and for a permanent injunction restricting defendants from interfering with his enjoyment, on the following grounds: (1) that the sale was held without due notice to him, (2) that there was no publication, and (3) that the price was grossly inadequate. The first Court held on all these points in favour of the plaintiff, and passed a decree as prayed for. Defendants appealed, and the Appellate Court held that a Civil Court had no jurisdiction to entertain such a suit and allowed the appeal. That such a suit would lie has been held by a Full Bench of this Court in *Rajah of Ramnad* v. *Venkatarama Aiyar* (1). The vakil for the respondents contended that this ruling would not apply because, there was an application to set aside the sale under S. 131 of the Act, and that O.21, R. 92 (1) of the Code of Civil Procedure barred the suit. This rule runs as follows:

"Where no application is made under R.89, R.90 or R.91, or where such application is made and disallowed, the Court shall make an order confirming the sale, and thereupon the sale shall become absolute."

I may here state that S. 89 is similar to S. 131 of the Estates Land Act, and it was represented that the applications put in by plaintiff under this section were dismissed because the proper sum was not deposited. S. 192 of the Estates Land Act relates to the application of the Code of Civil Procedure to "suits, appeals and other proceedings under the Act" and it lays down that "subject to the other provisions of this Act and subject to the following modifications and additions, the provisions of the Code of Civil Procedure shall apply to all suits, appeals and other proceedings under this Act so far as they are not inconsistent therewith." And in cl. (2) it is stated that S. 310-A (corresponding to R. 89 of O. 21) shall not apply. Now if R. 89 of O. 21 of the Code of Civil Procedure does not apply to proceedings under the Estates Land Act, I fail to see how R.92 (1) of O. 21 can be made applicable simply on the ground that S. 131 of the Estates Land Act is similar to R. 89 of O. 21. As observed in the Full Bench case above referred to, the jurisdiction of Civil Courts is taken away only in cases referred to in S.189 of the Estates Land Act, and it was not even suggested that there is anything in this section to bar the suit out of which this Second Appeal arises.

1. (1922) I L R 45 M 890 : 43 M L J 264 (F B).

Mahalinga Naicker v. Vellaya Naicker.

Viswanatha Sastri, J.

I would therefore allow the appeal and setting aside the decree of the Lower Appellate Court direct that that Court do re-hear the appeal. Appellant will get his costs in this Court and costs in the Lower Appellate Court will abide and follow the result. Appellant will get a refund of the Court-fee paid on the memorandum of appeal.

Odgers, J.

Odgers, J. :—I agree. It was stated in the referring judgment in *Rajah of Ramnad* v. *Venkatarama Aiyar* (1) as well settled that the Civil Courts have jurisdiction in all cases in which they would have had jurisdiction prior to the Act except in so far as such jurisdiction is expressly or by necessary implication taken away by the provisions of S. 189 of the Estates Land Act. The question put before the Full Bench was quite general in its terms. It is admitted that the only distinction between this case and that dealt with by the Full Bench is that two unsuccessful applications were made by the ryot under S. 131. I cannot see that this makes the slightest difference in principle and a suit by a ryot who says that his property has been improperly sold is expressly said by the Full Bench to be outside the restrictive provisions of the Madras Estates Land Act. I agree as to the order proposed by my learned brother.

A. S. V. *Appeal allowed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE JACKSON.

Sundara Naicker ... *Petitioner** (*Petitioner-defendant*)

v.

Potti Naicker ... *Respondent* (*Counter-petitioner —Plaintiff*).

Sundara Naicker v. Potti Naicker.

Madras Village Courts Act (I of 1889), Ss. 13 and 73—Discretion of District Munsif—Interference by the High Court in revision—Suit for value of damaged crops—Whether a claim for the value of "personal property" within S. 13.

A District Munsif has the widest discretion under S. 73 of the Village Courts Act and even if facts are established bringing the case within one of the three categories which may warrant revision by him as set forth in the section, he may still exercise his discretion whether he will interfere. Consequently, it can only be in very rare exceptional cases that the revisional powers

*C R P No. 140 of 1925. 16th August, 1926.

1. (1922) I L R 45 M 890 43 M L J 264 (F B).

Sundara Naicker v. Potti Naicker.

of the High Court will be attracted by any proceedings of a District Munsif under S. 73.

A party can sue for the value of damaged crops in a village Court, as it is a claim for the value of personal property as contemplated by S. 13 of the Act. Personal property is not defined in the Act and presumably it means moveable property as defined by the Transfer of Property Act.

Petition under S. 115 of Act V of 1908 and S. 107 of the Government of India Act praying the High Court to revise the order of the Court of the District Munsif of Sathur, dated 13th August, 1923 in O.P.No.24 of 1924 (Suit No. 4 of 1924, Panchayat Court of Sippiparai).

T. M. Ramaswami Aiyar for petitioner.

K. S. Ramabhadra Aiyar for respondent.

The Court delivered the following

JUDGMENT :—Petitioner seeks to revise the order of the District Munsif, Sathur, in O. P. No. 24 of 1924, declining to act under S. 73, Madras Act I of 1889. A District Munsif has the widest discretion under this section and, even if facts are established bringing the case within one of the three categories which may warrant revision as set forth in the section, he may still exercise his discretion whether he will interfere. Therefore, it can only be in very rare and exceptional cases that the revisional powers of this Court will be attracted by any proceedings of a District Munsif under S. 73. The petitioner would have been on stronger ground if he had moved this Court to revise the judgment of the Panchayat Court itself, but in a petition confined to the decision of the Munsif, it cannot be said that he failed to exercise jurisdiction for he heard arguments from both sides and it cannot be said that he ought of necessity to have set aside the decree, because he has full discretion in the matter. Nor in a revisional proceeding of this sort, can it be said that to state that he sees no sufficient cause to disturb the decree of the Lower Court, is to write an inadequate order.

Two grounds are urged which would be more germane to a petition against the original decree. Firstly, that the Panchayat Court heard no evidence. This is inferred from the record. " Witnesses examined for the plaintiff *nil*, " but it seems probable that the plaintiff himself was examined and there is no suggestion to the contrary in the present petition.

Secondly, that a party cannot sue under Madras Act I of 1899, for the value of damaged crops, inasmuch as it is not a claim for the value of personal property as contemplated by

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S. 13. Personal property is not defined in the Act and presumably, it means moveable property and moveable property as defined by the Transfer of Property Act includes growing crops. If the cause of action is the destruction of a growing crop, a party may sue for its value in the village Court.

The petition is dismissed with costs.

N.S. *Petition dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE DEVADOSS AND MR. JUSTICE WALLER.

Jammi Hanumantha Rao ... *Appellant** (*Plaintiff*)

v.

Aratla Latchamma ... *Respondent* (*Defendant*).

Hanumantha Rao v. Latchamma.

Probate and Administration Act (V of 1881), S. 69—"Claiming to have any interest in the estate of the deceased"—Person claiming maintenance from the estate of the deceased—Persons whether should claim through the testator—Person claiming property adversely to the testator—Right to enter caveat.

A person who is entitled to any portion of the estate left by the deceased or a right to claim maintenance from the estate of the deceased has an interest within the meaning of S 69 of the Probate and Administration Act. It is not necessary that he should claim through the testator in order to enable him to oppose the grant of probate of the will of the testator. If a person is likely to suffer by the grant of probate of a forged will or an invalid will, he has sufficient interest to enter a caveat. *Garbini Dassi* v. *Pratap Chandra Shaha*, (1900) 4 C W N 602; *Abhiram Dass* v. *Gopal Dass*, (1889) I L R 17 C 48; *Pirojshah Bikhaji* v. *Pestonji Merwanji*, (1910) I L R 34 B 459 and *Kalajit Singh* v. *Parmeshar Singh*, (1917) 1 Pat L W 308 not followed. *In the matter of the petition of Bhobosoondari Dabee*, (1880) I L R 6 C 460; *In the matter of the petition of Hurro Lall Shaha*, (1882) I L R 8 C 570; *Rahamtullah Sahib* v. *Rama Rao*, (1894) I L R 17 M 373; *Arakal Bastian Ansap* v. *Narayana Aiyar*; (1910) I L R 34 M 405; *Syama Charan Baisya* v. *Prafulla Sundari Gupta*, (1915) 19 C W N 882 and *Akhileswari Dasi* v. *Harichasan*, (1925) 40 C L J 297 referred to.

Per Waller, J.—The words in S. 69 of the Probate and Administration Act "claiming to have any interest in the estate of the deceased" are intended to bear the same meaning as the words in the English Act "having a pretending interest in the (personal) estate affected by a will." *Kishen Dai* v. *Satyendranath Dutt*, (1901) I L R 28 C 441 followed.

Appeal against the decree of the District Court of Ganjam, dated 8th August, 1923 in O. S. No 35 of 1922.

B. Jagannadha Doss for appellant.

T. A. Anantha Aiyar, amicus curiae, for respondent.

The Court delivered the following

JUDGMENTS :—*Devadoss, J.* :—The appellant applied for the probate of the will of one Narasamma, dated 4th

Devadoss, J.

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*A A O No. 491 of 1923. 23rd March, 1926.

Hanumantha Rao v. Latchamma

Devadoss, J.

June, 1920. The grant of probate was opposed by the respondent who is the widow of the brother of Narasamma's husband, and the District Judge held that it was not proved that Narasamma executed the will and dismissed the application.

Mr. Jagannadha Doss for the appellant raises the contention that the respondent was not entitled to oppose the grant of probate as she had no interest in the estate of the deceased so as to be entitled to enter caveat under S. 69 of the Probate and Administration Act (V of 1881). As there is a conflict of authority on this point and as the respondent has not appeared to oppose the appeal, we asked Mr. Anantha Aiyar to appear as *amicus curiae*, and we are thankful to him for bringing to our notice the cases opposed to the contention of the appellant. Under S. 69 "In all cases it shall be lawful for the District Judge, if he thinks fit, to issue citations calling upon all persons claiming to have any interest in the estate of the deceased to come and see the proceedings before the grant of probate or letters of administration." What is the nature of the interest which a person should have in order to entitle him to enter a caveat? The contention of the appellant is that the person who enters a caveat should claim a right to the property under the testator, and if he claims the property adversely to the testator he is not entitled to oppose the grant of probate, for his right would not be affected by the grant of probate or letters of administration with the will annexed. The respondent claims the right to maintenance out of the income of the property devised under the will as she is the widow of the undivided brother of the testatrix's husband. The relationship is not denied, and the only question is whether the claim to maintenance against the property devised by the will, granting that the allegation of the respondent is true, would entitle her to oppose the grant of probate. In *Garbini Dassi v. Pratap Chandra Shaha* (1) it was held that the right to maintenance was not such an interest as would entitle a person to oppose the grant of probate. This is a direct authority in favour of the appellant. In *Abhiram Dass v. Gopal Dass* (2) it was held by a Bench of the Calcutta High Court that "a person not claiming any of the property of the testator but disputing the right of the testator to deal with certain property as his own has not such an interest in the estate of the testator as entitles him to come in and oppose the grant of probate."

1. (1900) 4 C W N 602. 2. (1889) I L R 17 C 48.

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The learned Judges observe at page 52:

"The term" (meaning interest in S 69) "does not necessarily refer to any particular property, but to the claim of any person to succeed by inheritance or otherwise to any portion of the estate of the deceased by reason of an interest, not on an adverse title to the testator to any particular property, but in the estate itself, whatever that may consist of The form of the caveat too would seem to show that the person who enters a caveat admits that the particular property forms a portion of the estate of the testator, but objects either to the execution of the will or to the proposed manner of dealing with any portion of the estate."

The learned Judges declined to follow the two previous decisions of the same Court in *In the matter of the petition of Bhobosoonduri Dabee* (3) and *In the matter of the petition of Hurro Lal Shaha* (4). The case in *Abhiram Dass* v. *Gopal Dass* (2) has been followed by other High Courts. In *Pirojshah Bikhaji* v. *Pestonji Merwanji* (5) it was held following *Abhiram Dass* v. *Gopal Dass* (2) that a person who wishes to come in as the caveator must show some interest in the estate derived from the deceased by inheritance or otherwise. The Patna High Court takes the same view in *Kalajit Singh* v. *Parmeshar Singh* (6).

The words of S. 69 are "claiming to have any interest in the estate of the deceased." There is nothing in the wording of the section to show that the caveator should claim interest through the testator. All that is necessary to entitle a person to enter caveat is to claim interest in the estate of the deceased. The words 'interest in the estate' do not necessarily convey the idea that the interest should be claimed through the testator. If that was the intention of the legislature the clause could have been differently worded so as to make the meaning clear. In India under the Hindu Law, the widow of a co-parcener is entitled to maintenance and if a person disposes of the property as his self-acquisition in favour of the legatees, the widow of a co-parcener will be driven to the necessity of filing a suit against the executor or legatee and proving that it is joint family property. A person claiming to be the undivided brother of the testator claims an interest not through the deceased but independently of him. Can he enter a caveat on the ground that the property devised is the joint property of himself and the testator ? It has been consistently held that a reversioner is entitled to oppose the grant of probate. In *Syama Charan Baisya* v. *Prafulla Sundari Gupta* (7) it was held by Mookerjee, J. and Chap-

2 (1889) I L R 17 C 48.
3. (1880) I L R 6 C 460.
4. (1882) I L R 8 C 570.
5. (1910) I L R 34 B 459.
6. (1917) 1 Pat L W 308.
7. (1915) 19 C W N 882.

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man, J., after an examination of the authorities, "that although a reversioner under the Hindu Law has no present alienable interest in the property left by the deceased, he has substantial interest in the protection or devolution of the estate and as such is entitled to appear and be heard in a probate proceeding." See *also Akhileswari Dasi* v. *Haricharan* (8). Can it be said that a reversioner claims through the testator? If the principle of law enunciated in *Pirojshah Bikhaji* v. *Pestonji Merwanji* (5) and *Abhiram Dass* v. *Gopal Dass* (2) is correct, a reversioner who does not claim through the testator cannot oppose the grant of probate. A Hindu will may contain a power to adopt. A reversioner who has interest in preventing the estate from going to a third person by reason of a forged will containing a power to adopt is entitled to protect the estate from going to strangers. If a reversioner who has no present interest in the estate is entitled to come in and oppose the grant of probate, it is difficult to see how a person who claims right to maintenance from the estate devised by the testator is not entitled to oppose the grant of probate. Under the English Law the personal estate is his absolute property and nobody has any right to it till he dies. But under the Hindu Law a widow has the right to claim maintenance and the widow of an undivided co-parcener is entitled to maintenance. If the property devised is joint family property the reversioner is entitled to see that the reversion is not endangered. In *In the matter of the petition of Bhobosoonduri Dabee* (3), Field, J., after a very exhaustive examination of the authorities held that under S. 242 of the Succession Act any person who can show that he is entitled to maintain a suit in respect of property over which probate would have effect, possesses a sufficient interest to entitle him to enter a caveat and oppose the grant. In that case the testator left his widow and two sons and purported to give the entire property to his widow for her life and after her death to his two sons. A mortgagee of the son's share and a decree-holder against the other son opposed the grant of probate. Both the Judges who heard the case (White and Field, JJ.) held that the mortgagee of the son's share was entitled to oppose the grant of probate as by the will they would be left without a remedy.

2. (1889) I L R 17 C 48.
3. (1880) I L R 6 C 460.
5. (1910) I L R 34 B 459.
8. (1923) 40 C L J 297.

In the Court of Probate Act 20 and 21 Vic. c. 77, S. 61 the wording is:

"Others having or pretending interest in the personal estate affected by a will should be cited or summoned and may be permitted to become parties or intervene for their respective interests."

A portion of that section is practically copied in S. 69 of the Probate and Administration Act (V of 1881) and S. 242 of the Indian Succession Act (X of 1886) with slight modifications. Instead of the words 'having or pretending interest in the personal estate' the wording in the Indian enactments is 'claiming to have an interest.' Field, J., observed at page 471:

"As to the test of what constitutes a sufficient interest to entitle any particular person to be made a party, according to the view which I have already stated, I think it comes to this, that any person has a sufficient interest who can show that he is entitled to maintain a suit in respect of the property over which the probate would have effect under the provisions of S 242 of the Indian Succession Act."

The learned Judges who decided *Abhiram Dass* v. *Gopal Dass* (2) differed from *In the matter of the petition of Bhobosoonduri Dabee* (3) on the ground that the rule laid down by Field, J., was not adopted by White, J. Though White, J., did not lay down the rule in such broad terms as Field, J., yet he held that the mortgagee of the son's share was entitled to oppose the grant of probate of the father's will. In *In the matter of the petition of Hurro Lal Shaha* (4) it was held that a presumptive reversioner to property with which a will deals has a sufficient interest in the property to entitle him to maintain a suit in respect of such property and that he is entitled to maintain a case for the revocation of probate. The learned Judges followed the decision in *In the matter of the petition of Bhobosoonduri Dabee* (3). In *Kishen Dai* v. *Satyendranath Dutt* (9) a Bench of the Calcutta High Court held that

"the words 'interest in the estate of the deceased' in S. 69 of the Probate and Administration Act mean 'interest in the estate left by the deceased' and that a judgment-creditor who but for the will would in execution of his decree have a right to seize the property or that share of it which should descend to his debtor and who alleges that the will has been set up for the purpose of defrauding the creditors is a person claiming an interest in the estate of the deceased and as such has a *locus standi* in opposing the grant of the probate of the will."

2. (1889) I L R 17 C 48.
3. (1880) I L R 6 C 460.
4. (1882) I L R 8 C 570.
9. (1901) I L R 28 C 441.

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It cannot be said that a Hindu son claims through his undivided father. If the father devises his property as his self-acquisition, is not the son entitled to oppose the grant of probate on the ground that it is a perjury? And it cannot be said in such a case that he claims through the father. In *Arakal Bastian Ansap* v. *Narayana Aiyar* (10) it was held that the judgment-creditors of the son of the deceased, who had attached the son's interest in his deceased father's estate before the application for probate, were entitled to oppose the grant of probate. It is contended that the Privy Council in *Nilmoni Singh Deo* v. *Umanath Mookerjee* (11) disallowed the contention that an attaching creditor of a son's share was entitled to oppose the grant of the probate of the father's will. Their Lordships did not decide the point but only expressed a doubt. They observe at page 28:

"They entertain grave doubts whether an attaching creditor can do so, at least in a case which is not founded on the ground that the probate has been obtained in fraud of creditors."

They give no final opinion upon it. If a testator purports to devise his property as his self-acquisition in order to defeat his undivided brother or to defeat the claim for maintenance of the widow of his co-parcener, does he not commit fraud? and is not the brother or the widow entitled to question the genuineness of the will? In *Rahamtullah Sahib* v. *Rama Rao* (12) it was held that a legatee under a will or a creditor of the testator had not such interest as to entitle him to oppose the grant of probate. In the case of a creditor the estate is liable whether the will is genuine or not. The executor, and if there is no executor, the administrator, is bound to pay the debts of the testator out of the estate and the creditor will not ordinarily suffer in any way by a false will being propounded and probate thereof being obtained. There may be cases where it may be to the interest of the creditor to oppose the grant of probate if, by obtaining probate, an unscrupulous person or a person of no means is enabled to make away with the property of the deceased and thereby defeat the creditor. If the probate proceedings are fraudulent any person who would suffer thereby is entitled to object to such proceedings. In *Crispin* v. *Doglioni* (13) the natural son of the testator objected to the grant of probate on the ground that by the law of Portugal he was entitled to the whole of

10. (1910) I L R 34 M 405

11 (1883) I L R 10 C 19: 10 I A 80 (P C)

12. (1894) I L R 17 M 373. 13. (1860) 2 Sw & Tr 17.

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the deceased's property and that he had instituted a suit in Portugal against the executor in which he obtained a decree that he should be put into possession of the property. The declaration did not state the nature of the suit, nor the questions involved in it, nor did the judgment show that the plaintiff was in the same position as a legitimate son. The learned Judges held that the foreign judgment alone did not show such an interest in the party in whose favour it was made as to entitle him to dispute the will. If the judgment of the foreign Court had given the property to him the learned Judges might probably have allowed him to contest the grant of probate. In *Brinda Chowdhrani* v. *Radhica Chowdhrani* (14) it was held that the widow of a Hindu testator who had died leaving sons had sufficient interest to call upon the executor to prove the will in solemn form *per testes*. At page 494 they observe:

> "She is entitled to maintenance and if she pleases to institute a suit, to have her maintenance made a charge upon the estate of her deceased husband."

The true principle deducible from the cases is that a person who is entitled to any portion of the estate left by the deceased or a right to claim maintenance from the estate of the deceased has an interest within the meaning of S. 69 of the Probate and Administration Act. It is not necessary that he should claim through the testator in order to enable him to oppose the grant of probate of the will of the testator. If a person is likely to suffer by the grant of the probate of a forged will or an invalid will he has sufficient interest to enter a caveat.

The next contention is that the judgment of the learned Judge is opposed to the evidence in the case. The will bears the date 4th June, 1920. The application for probate was made only in 1922. The will is said to have been executed on the day of the testatrix's death. She was ill for about a fortnight and the will is said to have been written about 8 a. m. and she died the same afternoon. Persons suffering from diabetes are as a rule in a comatic condition before death. It is said that she was able to dictate the will at 8 o'clock, a few hours before her death and she died suddenly on account of the boil bursting. The evidence on the side of the appellant is not at all satisfactory. The draft of the will has not been produced and the chief witness for the appellant who is the sole legatee under the will is a karnam and his con-

14. (1885) I L R 11 C 492.

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duct in the box was such as to arouse suspicion. A Revenue Inspector was said to have been present at the time of the execution of the will and he was not examined in the case. It was suggested that his presence could not be secured at the time when the case came on for hearing. If an application had been made to the learned Judge he certainly would have granted an adjournment for the examination of the Revenue Inspector. The Revenue Inspector did not attest the will. This looks very suspicious. If the will is a genuine will, there is no reason why the appellant should not have examined the Revenue Inspector as his witness. P. Ws. 2 and 3 are relations; and we see no reason to differ from the finding of the learned Judge that it has not been satisfactorily proved that the will was executed by Narasamma or that at the time of the alleged execution of the will she was in a sound disposing state of mind.

Waller, J.

Waller, J. :—On both points I agree. I think that the words in S. 69 of the Probate and Administration Act "claiming to have any interest in the estate of the deceased " are intended to bear the same meaning as the words in the English Act "having or pretending interest in the (personal) estate affected by a will." That is the view taken in *Kishen Dai* v. *Satyendranath Dutt* (9) which I would follow.

On the merits, I see no reason to dissent from the conclusion of the District Judge. The appeal must be dismissed.

N. S. *Appeal dismissed.*

PRIVY COUNCIL.

(On Appeal from the High Court of Judicature at Madras.)

PRESENT :—LORD FINLAY, LORD BLANESBURGH, SIR JOHN EDGE AND MR. AMEER ALI.

Mahomed Khaleel Shirazi and Sons. . .*Appellants** (*Pltffs.*)

v.

Les Tanneries Lyonnaises and another . . . *Respondents.*

P. C.

Md. Khaleel Shirazi and Sons v. Les Tanneries Lyonnaises.

High Court (Madras)—Original Side—Jurisdiction—Contract for sale of goods made at Pondicherry by person resident there—Moneys due under, payable at Madras—Suit for recovery of, with leave obtained—Maintainability—Privy Council—Appeal to—Competency of—Decree dismissing suit against one of defendants—No appeal therefrom to Appellate Court—Appeal to Privy Council in case of—Civil Procedure Code, 1908, *O.* 41, *R.* 33*—Applicability—Appeal—*

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*P C Appeal No. 30 of 1924. 4th February, 1926.

9. (1901) I L R 28 C 441.

P. C.

Md. Khaleel Shirazi and Sons v. Les Tanneries Lyonnaises.

Additional evidence in—Admissibility—Conditions—Civil Procedure Code, S. 107—Effect of creditor and debtor—Law as to—Suit by creditor—Defence of payment to third party—Authority to receive payment—Burden of proving authority on debtor.

The appeal arose out of a suit instituted in the Ordinary Original Civil Jurisdiction of the High Court by the plaintiffs, who lived in the City of Madras, to obtain a decree against a French Company and their agent *M* for money alleged to be due to the plaintiffs under two contracts for the sale and delivery of goods. The French Company carried on business at a place in France. *M* lived at Pondicherry. The first contract was made by *M*, as the agent of the French Company, with the plaintiffs in the City of Madras, and the money which might become due under it was payable at a Bank in the City of Madras. The second contract was made by *M* at Pondicherry, and the money which might become due under it was payable to the plaintiffs at the Bank in the City of Madras.

On objection taken that the suit was not within the cognizance of the High Court in its Original Civil Jurisdiction, *held* that, as the first contract was made in the City of Madras, and it was agreed that the money payable under it should be paid in the City of Madras, and as it was agreed that the money payable under the second contract should be paid in the City of Madras, and as the High Court, under its Letters Patent, gave leave to the plaintiffs to bring the suit in the Ordinary Original Civil Jurisdiction of the High Court, the suit was within the cognizance of the High Court in its Ordinary Original Civil Jurisdiction.

In the above suit, the Trial Judge gave a decree to the plaintiffs against the French Company and dismissed the suit against *M*. *M* was, however, directed to pay the plaintiffs their costs of the suit. The plaintiffs did not appeal against the decree of the Trial Judge, but the French Company and *M* jointly appealed against the decrees which had been made against them. On that appeal, the High Court found that the French Company was not liable to pay anything in respect of the claim under the second contract, and by its decree modified the decree against them made in respect of their liability under the first contract, with certain costs, and dismissed the suit against *M*.

On appeal preferred by the plaintiffs against that decree in appeal, *held*, that the appeal to His Majesty in Council, in so far as *M* was concerned, was, in effect, an appeal direct to His Majesty in Council from the decree of the Trial Judge, and was not allowable under Civil Procedure Code, 1908, or under the Letters Patent of the High Court. O. 41, R. 33, Civil Procedure Code, was not intended to apply to such an appeal.

The High Court as an Appellate Court has, under S. 107 of Civil Procedure Code of 1908, power to take additional evidence. But it is a power which should be exercised by an Appellate Court with much caution and only in suits where it is satisfied that in the interests of justice it should be exercised, and that such additional evidence when admitted will be evidence which, if produced at the trial, would have been admissible.

When a creditor sues the debtor for the payment of a debt and the defence is that the debtor paid the debt to another person, it is for the debtor to prove that the other person had or had been held out to the debtor by the creditor as having had the authority of the creditor to receive payment of the debt on behalf of the creditor.

Appeal from a decree of the High Court, Appellate Jurisdiction (Coutts Trotter and Ramesam, JJ.), dated the

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14th March, 1922, varying a judgment of the same Court, Original Civil Jurisdiction (Phillips, J.), dated the 20th October, 1920.

The facts appear fully set out in their Lordships' judgment. The case is only reported with reference to the point of law.

E. B. Raikes for respondent No. 2 took the preliminary objection that the appeal was not competent. The suit was dismissed against this respondent by the Trial Judge, and the appellant not having appealed, the decree became final. Neither the Letters Patent (Madras), S. 39, nor the Civil Procedure Code, 1908, O. 41, R. 33 confer on the appellant any further right of appeal. Such right is extinct, and his present appeal, in effect, seeks to revive it. *Gangadhar* v. *Banabasi,* (1915) 22 C. L. J. 390 and *Bhaidas Shivdas* v. *Bai Gulab*, (1921) L. R. 48 I. A. 181.

Sir George Lowndes, K. C., K. Brown and *T. C. K. Kurup* for appellants replied.

A. M. Dunne, K. C. and *B. White* for respondents.

4th February, 1926. The Judgment of the Board was delivered by

Sir John Edge.

SIR JOHN EDGE.—This is an appeal by the plaintiffs from a decree, dated March 14, 1922, of the High Court at Madras, which was made in its Appellate Civil Jurisdiction and varied a decree dated October 20, 1920, of a Judge of the same Court, which was made in the Ordinary Original Civil Jurisdiction of the High Court.

The appeal arises in a suit which was instituted with the leave of the High Court on February 3, 1919, in the Ordinary Original Civil Jurisdiction of the High Court by the plaintiffs, who live in the City of Madras, to obtain a decree against Les Tanneries Lyonnaises and their agent Monsieur J. Marret for money alleged to be due to the plaintiffs under a contract for the sale and delivery of goat skins under a contract of May 25, 1917, and under a contract of January 26, 1918, for the sale and delivery of sheep skins. There was another defendant to the suit named C. Sowrimuthooroya Oodayar, against whom no relief was claimed. The suit was tried, and the decree of the Trial Judge was made in the Ordinary Original Civil Jurisdiction of the High Court.

The French Company carries on business at Oullins, near Lyons, in France. Marret and Oodayar live at Pondicherry.

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The contract of May 25, 1917, was made by Marret, as the agent of the French Company, with the plaintiffs in the City of Madras, and the money which might become due under it was payable at a Bank in the City of Madras. The contract of January 26, 1918, was made by Marret at Pondicherry, and the money which might become due under it was payable to the plaintiffs at the Bank in the City of Madras.

The Trial Judge made, on October 20, 1920, a decree for Rs. 1,76,242-0-5 with interest thereon and for costs against the French Company, and by his decree dismissed the suit against Marret and Oodayar, but decreed that Marret should pay to the plaintiffs taxed costs and interest thereon. The plaintiffs did not appeal to the High Court against the decree of the Trial Judge dismissing the suit against Marret. They had obtained a decree against the French Company for their entire claim, and with that they were then content. As appears by the record, the French Company and Marret jointly appealed to the High Court against the decrees which had been made against them. On that appeal the High Court found that the French Company was not liable to pay anything in respect of the claim under the contract of January 26, 1918, and by its decree modified the decree against them made in respect of their liability under the contract of May 25, 1917, with certain costs, and dismissed the suit against Marret and Oodayar. Against that decree of the High Court this appeal by the plaintiffs has been brought.

In the High Court Marret, on behalf of the French Company and himself, had filed a joint written statement. In this appeal for the first time the French Company and Marret are represented by different counsel instructed by separate firms of solicitors. Those learned counsel raised preliminary objections to the appeal, the consideration of which their Lordships decided should stand over until the arguments on the appeal had been heard. Their Lordships will now state what those preliminary objections were and what is their decision on them. Each of the learned counsel contended that the suit was not within the cognizance of the High Court in its Original Civil Jurisdiction. The learned counsel for Marret further contended that this appeal to His Majesty in Council is, in effect, an appeal against the decree of the Trial Judge dismissing the suit as against Marret, from which decree the plaintiffs had not appealed, and that such an appeal was not allowed by the Code of Civil Procedure, 1908, or by the Letters Patent of the High Court.

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As to the objection that the suit was not within the cognizance of the High Court in its Original Civil Jurisdiction, their Lordships find that the contract of May 25, 1917, was made in the City of Madras, and it was agreed that the money payable under that contract should be paid in the City of Madras, and that it was agreed that the money payable under the contract of January 26, 1918, should be paid in the City of Madras, and further find that the High Court, under its Letters Patent, gave leave to the plaintiffs to bring the suit in the Ordinary Original Civil Jurisdiction of the High Court and consequently hold that the suit was within the cognizance of the High Court in its Ordinary Original Civil Jurisdiction, and disallow that objection.

As to the objection especially raised by the learned counsel for Marret, that as the plaintiffs had not appealed against the decree of the Trial Judge dismissing the suit, excepting as to costs, against Marret, no appeal lay against him, their Lordships have been referred to the Code of Civil Procedure, O. 41, R. 33, *Gangadhar* v. *Banabasi* (1) and *Bhaidas Shivdas* v. *Bai Gulab* (2). Their Lordships think that this appeal to His Majesty in Council, in so far as Marret is concerned, is, in effect, an appeal direct to His Majesty in Council from the decree of the Trial Judge, which is not allowable under the Code of Civil Procedure, 1908, or under the Letters Patent of the High Court, and they hold that the Code of Civil Procedure, 1908, O. 41, R. 33, was not intended to apply to such an appeal, and they accordingly decide that the appeal, so far as Marret is concerned, should be dismissed, but without costs.

Their Lordships will now consider the appeal so far as it relates to the French Company alone. The contract for goat skins of the 25th May, 1917, was made with the plaintiffs by Marret as the agent of the French Company, and it is now admitted in this appeal by the learned counsel for the French Company, that Marret, in making with the plaintiffs the contract of the 26th January, 1918, for sheep skins, was the agent of the French Company if he represented that he was making it as their agent.

The appeal involves the consideration of some complicated questions of fact.

[Their Lordships then set out the facts in detail.]

1. (1915) 22 C L J 390.
2. (1921) L R 48 I A 181: 40 M L J 519 (P C).

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Before considering separately the contracts of the 25th May, 1917, and 26th January, 1918, their Lordships will state, so far as it is necessary to do so in this suit, what is the law in India as well as in England with regard to payments of debts to a person who, as in this suit, is alleged by a debtor to have had the creditor's authority to receive them on his behalf. It is elementary law that when a creditor sues the debtor for the payment of a debt and the defence is that the debtor paid the debt to another person, it is for the debtor to prove that the other person had, or had been held out to the debtor by the creditor as having had the authority of the creditor to receive payment of the debt on behalf of the creditor.

In the joint written statement which, according to the record, the French Company and Marret filed, it was alleged that payments had been made to Oodayar as a partner of the plaintiffs. It was proved at the trial that Oodayar was not a partner of the plaintiffs in either of the contracts with which this suit is concerned. That defence was abandoned and it was alleged by Marret in his evidence, as their Lordships understood his evidence, that Oodayar had been authorised by the plaintiffs to receive the payments on their behalf and later that Oodayar had been held out by plaintiffs to him as having their authority to receive them. That authority and the alleged holding out of it is not admitted and is denied by the plaintiffs, and in their Lordships' opinion there is no reliable evidence that Oodayar ever had or had been held out as having any such authority.

[The judgment then deals elaborately with the evidence on record relating to the French Company, finds that the agent had not acted honestly and that the decree of the Trial Court should be restored. It concludes as follows:—]

Their Lordships think that in fairness to the French Company they should state what the French Company allege was the position in which that Company found itself after this appeal to His Majesty in Council had been presented. The French Company say that they were first informed by the solicitors in London appearing for Marret that this appeal had been presented, and as their Lordships understand the French Company's statement that Company had previously no knowledge that a suit against them and Marret had been brought. The French Company say that the proceedings in the suit in Madras were defended by Marret without the knowledge or consent of the French Company,

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and that on receiving that information from Marret's London solicitors that this appeal had been presented, the French Company was advised that they should be separately represented in this appeal, and instructed their London agents that their case in the appeal should be settled and lodged with all due expedition. If facts could have been proved which would have justified application to amend the decree no such application was made.

There is one other question raised by the appellants in this appeal. It relates to the admission in evidence by the Appellate Court of documents which were not in evidence before the Trial Judge. The High Court as an Appellate Court had, under S. 107 of the Code of Civil Procedure, 1908, power to take additional evidence. In their Lordships' opinion it is a power which should be exercised by an Appellate Court with much caution and only in suits where it is satisfied that in the interests of justice it should be exercised, and that such additional evidence when admitted will be evidence which, if produced at the trial, would have been admissible. The additional evidence, admission of which is complained of on behalf of the appellants, however much it may have affected the judgment in the Court of Appeal, has not affected the judgment of their Lordships in the slightest degree.

Their Lordships will humbly advise His Majesty that the appeal, so far as it relates to Les Tanneries Lyonnaises, should be allowed, and the decree of the High Court in appeal should be set aside against both respondents, with costs payable by Les Tanneries Lyonnaises, and the decree of Phillips, J., should be restored and affirmed, and that the appeal, so far as it relates to Monsieur J. Marret, should, save as aforesaid, be dismissed without costs. The respondents, Les Tanneries Lyonnaises, should pay to the appellants their costs in the High Court and in this appeal.

Solicitor for appellants : *Douglas Grant.*

Solicitors for first respondent : *Thompson, Quarrell* and *Attneave.*

Solicitors for second respondent : *Josselyn and Elwes.*

A. de M. *Appeal allowed.*

PRIVY COUNCIL.

(On Appeal from the High Court of Judicature at Bombay.)

PRESENT :—LORD BLANESBURGH, LORD DARLING, SIR JOHN EDGE, MR. AMEER ALI AND LORD SALVESEN.

Bai Nagubai Manglorkar ... *Appellant**

v.

Bai Monghibai (since deceased) and others ... *Respondents.*

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Bai Nagubai Manglorkar *v.* Bai Monghibai.

Hindu Law—Concubine ("Avaruddha stri")—*Right to maintenance from deceased paramour's estate.*

Under Hindu Law, a woman who has lived consistently with, though not in the same house as, her paramour until his death, as his permanent concubine (*avaruddha stri*), and observed fidelity to him; is, upon his death, entitled to maintenance out of his estate. Slavery being no longer existent in India, and the concubine no longer being a slave of the household as in ancient times, her common residence with the paramour and the rest of his family is no longer essential for ensuring her right to such maintenance, so long as the concubinage is permanent, and her sexual fidelity to him be preserved.

Ningareddi v. *Lakshmawa,* (1901) I L R 26 Bom 163 approved.

Appeal from a decree of the High Court, Appellate Jurisdiction (Shah, Ag. C. J. and Crump, J.), dated 11th August, 1922, reversing a decree of the same Court in its Original Jurisdiction (Kanga, J.), dated 25th November, 1921.

The material facts of the case appear from the judgment of their Lordships.

E. B. Raikes for appellant.—The appellant, even on the facts found by the Appeal Court, was entitled to maintenance ; in any event, she was so entitled on the facts found by the Trial Judge, and the Appeal Court was wrong in differing from him on the facts, as they were likewise in allowing a new case of mixed law and fact, not raised on the issues, to be put forward in appeal. Neither the texts of the *Mayuka* and the *Mitakshara* nor the cases cited, *Khemkor* v. *Umiashankar,* (1873) 10 Bom. H. C. (A. C. J.) 381, *Vrandavandas* v. *Yamunabai,* (1875) 12 Bom. H. C. R. 229, *Yashvantrav* v. *Kashibai,* (1887) I. L. R. 12 Bom. 26, *Ningareddi* v. *Lakshmawa,* (1901) I. L. R. 26 Bom. 163, *Salu* v. *Hari,* 1877 P. J. 34 warrant the limitation put by the Appeal Court on a Hindu concubine's rights of maintenance and such restriction is opposed to the whole tendency of modern Hindu Law. In any event, the explanation of

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"avaruddha" by Nilakandha in the *Mayuka* is conclusive in his favour, and governs the case.

L. de Gruyther, K. C., Sir G. Lowndes, K. C. and *J. M. Parikh* for respondents.—The appellant was, as found by the Appeal Court, merely the deceased's mistress, and there being no text of Hindu Law, as administered in Bombay, entitling her to any maintenance from the deceased's estate, a decree for her claim would be against public policy. The *Mitakshara* and *Mayuka* apply, if at all, to a Hindu dying sonless or to a woman who is *avaruddha stri*—neither of which are the cases here; and the texts certainly have no application where, as here, the deceased has disposed of his property by will without providing for his mistress. The Appeal Court has found on the facts that she did not live with the deceased openly as a member of his family, and was neither known nor recognised as a dependent member of his family, and she is not one of the class of women referred to in the said texts. She is not entitled to maintenance as a possible female heir, but, at most, to a subsistence-allowance for food and raiment only.

In the course of the argument, the following treatises and commentaries were also cited to their Lordships:—Mulla's Hindu Law (3rd Edn.), Art. 459, p. 432; Mayne's Hindu Law (8th Edn.), p. 620; Stokes' Hindu Law, Mitakshara, p. 435, Ch. II, Art. 10, paragraphs 27-28; Gharpure's Translation of Mitakshara, p. 406; Mandlik's Hindu Law, p. 70.

29th April, 1926. The Judgment of the Board was delivered by

Lord Darling.

LORD DARLING.—This is an appeal *in forma pauperis* by special leave from a decree of the High Court dated the 11th August, 1922, which reversed a decree of that Court in its Original Jurisdiction dated the 25th November, 1921.

The question in the appeal is whether the appellant is entitled to maintenance from the estate of one Vasanji Madhavji Thaker, deceased.

The appellant is a member of the Gurav caste of Hindus, and at the age of twelve years was given into the keeping of a Shethia, or rich Hindu, named Gopal Mulji, and lived with him for twelve years and bore him two children, and during that time made the acquaintance of the deceased, who was a friend of his and used to accompany him occasionally when he visited her.

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The deceased was a very wealthy Hindu of the Lohana caste, who was married, but on bad terms with his wife (with whom he did not cohabit) and her two sons, whom by his will he afterwards practically disinherited. He was from Guzerat and lived in Bombay, and was therefore governed by the *Mayuka*.

The appellant, when of the age of about twenty-six, had to leave Gopal Mulji because of ill-treatment by him. The deceased then took her under his protection, and she lived with him on terms of affection on either side for at least five years before his death, bore him a daughter, was faithful to him during his life, and has been faithful to his memory since his death. Such was the esteem of the deceased for the appellant that he would have married her had not their difference of caste made it impossible.

After his death she applied to his executors for maintenance and to his widow and issue to admit her claim thereto, and on their failure to comply with her request she instituted the present suit, claiming maintenance as a Hindu concubine of the deceased in his sole keeping till his death. The respondents put in written statements in which they alleged that the appellant was a prostitute and was not faithful to the deceased during his life and had not led a chaste life since his death, but they did not deny that the facts alleged by her, if proved, would entitle her to maintenance.

The following are the issues raised—by counsel for the respondents—with the findings of each Court thereon:—

(1) Whether the plaintiff (appellant) was in the sole keeping of the deceased before his death.

Both Courts : Yes.

(2) Whether the deceased paid to the plaintiff a fixed monthly allowance of Rs. 400 per month prior to his death.

1st Court : Payments made averaging Rs. 400 per month.

2nd Court : Payments were made ; exact amount not material.

(3) Whether the plaintiff has continued to be chaste after the death of the deceased.

Both Courts : Yes.

(4) Whether the plaintiff is entitled to any and what maintenance.

1st Court : Yes ; reference as to amount.

2nd Court : No.

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At the trial it was proved that the deceased for the last five or six years of his life, if not for longer, had left his family house in the occupation of his wife and her children and was residing almost, if not entirely, with the appellant in a house rented in her name, that he had engaged a governess to teach her and her daughter, that he kept a motor car for his and her use, and that he took her up country with him and told his friends to call on him at the house where she lived, that his sons visited him there, and that he was nursed there during his last illness, and only removed shortly before his death.

The Trial Judge in his judgment defined the legal position to be that, where a Hindu woman has been kept by a Hindu till his death as his permanent concubine—as he found was the fact in regard to the appellant—his estate is liable for her maintenance in the hands of those who take it, even though the connection with her was an adulterous one, but that her right to maintenance is conditional upon her chastity.

He stated that the appellant gave her evidence in a very straightforward manner, and that he believed her, that he thought all the evidence given on her behalf truthful, and he disbelieved the evidence on the other side.

He held that it was established that Vasanji did not care for his family, nor they for him, and that he looked to the appellant as the person who was a member of his family and looked to her for nursing. He passed a decree in appellant's favour for maintenance and directed a reference to ascertain its amount.

The respondents 3, 4 and 5 appealed, but did not in their grounds of appeal suggest that, if the Trial Judge's findings of fact were correct, the appellant was not entitled to maintenance.

At the hearing of the appeal the Appellate Court adopted a new contention put forward on behalf of the respondents 3-5 by a counsel who had not appeared for them at the trial. That contention was that the Hindu concubine of a Hindu, though faithful to him till his death, was not entitled to maintenance from his estate unless she was *avaruddha*. The Appellate Court held that this term is in law applicable only to a woman openly kept by a Hindu in his own family and as a member of his family. They found on the evidence that the plaintiff was in the exclusive keeping of the deceased during the last four or five years immediately before his death in the

sense that she consorted with him alone during that time, but that the deceased did not make the plaintiff's house his residence, that the connection between the deceased and the plaintiff was not perfectly open and recognised, and was nothing more than that which a man might have with a woman who was his kept mistress living outside his house and unknown to his family. They also found that the plaintiff was not openly kept by the deceased "in his own family and as a member of the family," that she was not his "dependent" and was not known as such to all concerned; and that she had not accepted practically the obligation of a family life, but was merely a kept mistress of the deceased. The learned Judges stated that the question whether a mistress of a Hindu in the position of the plaintiff was entitled to maintenance had not been previously decided by the High Court. They held that only a woman who was in the position of an *avaruddha stri* to the deceased was entitled to any maintenance against his estate in the hands of his heirs, that the expression *avaruddha stri* meant at the present time a woman who openly lived as a wife, though not legally married, and as a member of the family in the house of the man, and was recognised by all concerned as his permanent concubine.

Having come to this conclusion, they scrutinised the evidence (which was given when no such questions had been raised) to find out whether the appellant had been so kept. As to the effect of this evidence Shah, A. C. J. differed in certain points from the Trial Judge; but Crump, J. accepted his findings, yet found that even on them the appellant was not entitled to maintenance. The High Court on appeal accordingly dismissed her suit.

From their decree dated the 11th August, 1922, the appellant, after obtaining a certificate under Ss. 109 and 110 of the Civil Procedure Code, obtained on the 28th November, 1922, special leave to appeal in *forma pauperis*, and she submits that her appeal should be allowed and the decree of the Trial Judge restored.

The question now to be decided upon this evidence is whether the appellant is entitled to maintenance out of the estate of the deceased, and this, as appears from the judgments delivered in the Court of Appeal, depends upon whether, upon the facts proved, she was in a strict sense, according to the Hindu Law, as prevailing in Bombay, the "permanent concubine" of deceased. This word "concubine" has long

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had a definite meaning, whether expressed in the language of India or of Europe. The persons denoted by it had, and have still where it remains applicable, a recognised status below that of wife and above that of harlot. In the Glossary of Du Cange, under the title " Concubine," we read that *Pellex honestior est quam Amica, ut quae accidat proprius ad uxoris naturam ;* and this, it would seem, is because *uxor nomen est dignitatis non voluptatis.* Almost a wife, according to ancient authorities, the distinction of the concubine from harlots was due to a modified chastity, in that she was affected to one man only, although in an irregular union merely. So Bracton is quoted by Du Cange as writing *Eadem etiam concubina legitima dicitur ad discrimen ejus quae quaestum facit.* Harlots solicited to immorality ; concubines were reserved by one man.

The law, which must decide this case, originated in the sayings of almost immemorial sages, but has long been condensed into such treatises as the *Mitakshara* and the *Mayuka.* The relevant passages from the *Mitakshara* are, in the judgment of the Court of Appeal, thus quoted from Stokes' Hindu Law :—

"Heirless property goes to the king, deducting, however, a subsistence for the females as well as the funeral charges.........the expression 'deducting, however, a subsistence for the females as well as the funeral charges' is explained as excluding or setting apart a sufficiency for the food and raiment of the women, and as much as may be requisite for the funeral repasts and other obsequies in honour of the late owner, the residue goes to the king........"

"This relates to women kept in concubinage; for the term employed is 'females' (*yoshid*). The text of 'Narada' likewise relates to concubines; since the word there used is 'woman' (*stri*)..........But a king who is attentive to the obligations of duty should give a maintenance to the women of such persons." The words used for 'women kept in concubinage' and 'concubines' in the original are '*avaruddha stri.*' 'Vijnaneswara' there clearly explains the meaning of the word '*stri*' in Narada's text, and the word '*yoshid*' used in Katyayana's text as including '*avaruddha stri.*' The text of Narada in para. 7 of the same section of the *Mitakshara* runs as follows:—"Thus Narada has stated the succession of brothers, though a wife be living; and has directed the assignment of a maintenance only to widows. Among brothers, if any one die without issue, or enter a religious order, let the rest of the brethren divide his wealth, except the wife's separate property. Let them allow a maintenance to his women for life, provided these preserve unsullied the bed of their Lord.'

"The women or female slaves, being unequal (in number, to the shares), must not be divided by the value, but should be employed in labour (for the co-heirs) alternately. But women (adulteresses or others) kept in concubinage by the father must not be shared by the sons, though equal in number; for the text of Gautama forbids it."

The Appellate Court decided, and their Lordships agree with them, that the right to maintenance, such as is here claimed, is limited to those women who amongst Hindus are pro-

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perly called *avaruddha ;* a word ordinarily and accurately rendered by " concubine " in English. *Avaruddha* has been defined by various writers, and the Appellate Court approved of this definition, taken from page 406 of Gharpure's Translation of the Vyavahara Adhyaya of the *Mitakshara,* " *Avaruddha stri* means women who are the protected slaves of another, " and Shah, A. C. J. quotes with approval these words from the commentary on the word *avaruddha* : " These very women are prohibited by the master from intercourse with other men, with an injunction to stay at home, with the object of avoiding any lapse of service. These are known as *avaruddha* or protected slaves. "

As Shah, A. C. J. points out in his judgment, the *Mayuka* is on this point in agreement with the Mitakshara ; and he quotes from Mandlik's Hindu Law, page 70, this passage :—

"*Striyah* are female slaves. When uneven in number, they are to be made to work by turns as they may be found workable; when even in number, they are to be divided. The kept mistresses of the father, however, though even in number, should not be divided, as directed by the following text of Gautama:—'There is no division of women appointed by the father for enjoyment.' "

These latter words are evidently a recognition of the manifest impropriety of allotting to sons the concubines of their father— women who might very well be mothers of the half brothers of these same sons.

In the judgment of the Appellate Court it is essential that to be *avaruddha stri,* or concubine, entitled to maintenance, the woman must be, in the words of Shah, A. C. J., " a continuously kept concubine, a woman in open residence and avowed connection with the man." That originally such women were slaves, and necessarily resident in the house as members of the family, is certain. But slavery no longer exists in India, so it is now contended that the *avaruddha stri,* though free women, must yet be subject to such restraint as is involved in living as a member of the family ; which in this case would mean living in the same house with the wife and children of the deceased man. It is unnecessary to hold here that *avaruddha* does now, as Mr. Raikes suggested, mean no more than kept and reserved for the sexual enjoyment of one man, to whom the mistress remains faithful; for all the facts of this case, even as accepted by the Court of Appeal, go far beyond any such mere reservation.

In the Court of Appeal, Shah, A. C. J. used these words:

"Taking a broad view of the case, I am satisfied that plaintiff was in the exclusive keeping of the deceased Vasanji during the last four or five years prior

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to his death, in the sense that she consorted with him alone during that time. But that connection is not, in my opinion, sufficient to bring the case within the scope of the rule which entitles a continuously kept concubine to maintenance. I may mention that the English expression 'continuously kept concubine' is the nearest approach to the meaning of '*avaruddha stri*.' It connotes an open residence and avowed connection with the man, both of which I think can be fairly said to be absent in the present case. I do not desire to lay down any hard and fast rule as to what mode of life and character of the connection between the kept woman and her paramour would be sufficient to constitute her an '*avaruddha stri*'; that must depend upon the facts and circumstances of each case and must be decided as a question of fact on the evidence."

Crump, J.'s judgment is to the like effect. Both Judges lay much stress on the fact that the appellant was not kept in the house of the deceased's family, but in a separate house; as was the fact.

Kanga, J., the Trial Judge, however, thus deals with that matter and the events of deceased's last illness:—

"The natural inference from this is that the deceased did not care for the members of his family, and the members of his family did not care for him, and the deceased looked to the plaintiff as the person who was a member of his family, and looked to her for nursing him."

Their Lordships agree with the Trial Judge in this view of the matter. And so the real question would appear to be whether to be of the family the concubine, otherwise entitled to maintenance, must reside in the same house with the deceased, together with his wife and the regular members of his family. Their Lordships are of opinion that such common residence is now unnecessary, whatever may have been the case when the concubine was a slave of the household. The emancipation may have been gradual, as several decided cases would indicate, but the case of *Ningareddi* v. *Lakshmawa* (1), a case in the Appellate Court, appears sufficient to establish the present position. As the headnote expresses it:—

"Under Hindu law a concubine gets no right of maintenance against her paramour unless, having been kept continuously till his death, it can be said that the connection had become permanent."

The facts of that case, so far as they are relevant to this one, were that one Govindraddi had a wife Venkawa, who, owing to ill-health, left him about the year 1877 and went to reside with her parents. Govindraddi then took Lakshmawa to his house and she lived with him as his mistress. In 1890, Venkawa, having regained her health, rejoined her husband; but Govindraddi continued to visit his mistress Lakshmawa

1. (1901) I L R 26 B 163.

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till his death in 1897. The Court decreed maintenance to Lakshmawa, the concubine. In this case the man and the woman were Hindus and the paramour was governed by the law of the Mayuka, and in their Lordships' opinion the decision above mentioned is sufficient authority for holding that, providing the concubinage be permanent, until the death of the paramour, and sexual fidelity to him be preserved, the right to maintenance is established ; although the concubine be not kept in the family house of the deceased. This incident of residence in the family house was not the essential reason for the right to have maintenance from the goods of the deceased paramour, but rather a means of ensuring the qualified chastity of the mistress.

As the claim of the appellant here had been before the Trial Judge resisted mainly on the ground that she had not remained chaste and faithful to the deceased, and not definitely on the ground that she was never in the position of *avaruddha stri* (permanent concubine) towards him, their Lordships are of opinion that the view most favourable to her should be taken in considering the evidence going to prove her exact position or status resulting from her connection with the deceased. For—had she been duly warned—the appellant might well have brought more evidence to fortify that contention and going to prove her precise situation. To their Lordships, however, it appears that the facts proved or admitted are certainly strong enough to bring this case within the rule entitling the appellant to maintenance out of the property of the deceased, since the findings in her favour go beyond those held sufficient, in the case of *Ningareddi* v. *Lakshmawa* (1) by the Court of Appeal in Bombay—a decision whose authority has not been questioned.

Their Lordships will humbly advise His Majesty that the decree of the High Court, dated the 11th August, 1922, should be set aside, except as to the costs of Bai Monghibai, Charandas Vasonji Thakkar, Ranchhoddas Vasonji Thakkar (minors) and Pragji Dayal Hariani (the order as to which is to stand), and that the decree of the High Court in its Original Civil Jurisdiction, dated the 25th November, 1921, should be restored. The appellant must have her costs of the appeal to the High Court, and such costs of this appeal as she may be entitled to as an appellant in *forma pauperis*, and the respond-

1. (1901) I L R 26 B 163.

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ents Nos. 1, 4, 5 and 6 will also have their costs of this appeal, all such costs to be paid out of the estate.

Solicitors for appellant : *Lattey and Hart.*

Solicitors for respondents : *T. L. Wilson and Co.*

A. de M. *Appeal allowed.*

PRIVY COUNCIL.

(On Appeal from the High Court of Judicature at Patna).

PRESENT :—VISCOUNT DUNEDIN, LORD BLANESBURGH AND SIR JOHN EDGE.

Sourendra Mohan Sinha and others ... *Appellants**

v.

Hari Prasad Sinha and others ... *Respondents.*

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Sourendra Mohan Sinha v. Hari Prasad Sinha.

Privy Council—Appeal—Order in Council in—Variation of—Conditions—Issue of Order in Council to which party to appeal—Practice—His duty to lodge Order in Court appealed from—Delay or refusal on his part to do so—Remedy of opposite party aggrieved thereby—Civil Procedure Code, O. 45, R. 15 (1)—Costs—Successful party—Disallowance of costs to—Grounds.

On an application made to vary an Order in Council which had already been passed, *held*, that it could only be under exceptional circumstances that their Lordships could advise that another Order should be made

The ordinary practice of the Privy Council is to issue the Order in Council to the party who has been substantially successful in the appeal; and it is the duty of that party in ordinary course to lodge it in the Court appealed from. When he either delays or refuses to lodge the Order, and the other party is prejudiced by the delay or refusal, the latter can, under O. 45, R. 15 (1) of Civil Procedure Code, apply to the Court appealed from with a certified copy of the Order and ask for a summary Order on the party in default to lodge the Order which was entrusted to him.

Costs disallowed to successful respondent, because he did not discharge his duty of lodging the Order

Petition to vary the terms of an Order in Council made upon an appeal.

S. Hyam for appellants.

Sir G. Lowndes, K. C. and *E. B. Raikes* for respondents.

16th February, 1926. The Judgment of the Board was delivered by

Viscount Dunedin.

VISCOUNT DUNEDIN.—This is an application to vary the Order in Council. The Order has been already passed, and it could only be under exceptional circumstances that their Lordships could humbly advise that another Order should be passed.

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*P C Appeal No. 136 of 1924. 16th February, 1926.

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In the suit judgment was given for the plaintiffs against the defendants for a certain sum.

On appeal to the King in Council their Lordships humbly advised His Majesty to reduce substantially the sum for which judgment had been given, and to make the sum still decreed payable eight months after the date of the receipt of the Order by the High Court.

The defendants having been substantially successful in the appeal, the Order in Council in accordance with the ordinary practice was issued to them, and in ordinary course ought to have been lodged by them in the High Court. They have not however done so, and the plaintiffs cannot therefore so far get execution. Hence this application. The plaintiffs and petitioners have not sufficiently adverted to O. 45, R. 15 (1) of the First Schedule to the Code of Civil Procedure. When they found that the defendants were delaying or refusing to lodge the Order they could have applied to the High Court with a certified copy of the Order and asked for a summary Order on the defendants to lodge the Order which had been entrusted to them so that execution might follow in terms of the judgment of this Board. This they can still do.

Their Lordships therefore cannot advise His Majesty to grant the prayer of the petitioners: but as they are clearly of opinion that it was the duty of the defendants in ordinary course to lodge the Order there will be no costs allowed on the petition.

Solicotors for appellants : *Barrow, Rogers* and *Nevill*.

Solicitors for respondents : *Watkins* and *Hunter*.

Petition dismissed.

PRIVY COUNCIL.

(On Appeal from the High Court of Judicature at Patna.)

PRESENT :—VISCOUNT DUNEDIN, LORD BLANESBURGH AND SIR JOHN EDGE.

Bindeshwari Prasad Singh ... *Appellant**

v.

Maharaja Kesho Prasad Singh Bahadur ... *Respondent.*

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Bengal Tenancy Act, VIII of 1885 (as amended by Act I of 1907), S. 120 (2) and (2) (a)—Zirat lands—Letting before 2nd March, 1883—Occupancy rights—"Any other evidence"—"Agreement or compromise".

Section 120 (2) of the Bengal Tenancy Act, VIII of 1885 (as amended by Act I of 1907) does not exclude as inadmissible evidence that, subsequent to

*P C Appeal No. 35 of 1924. 29th April, 1926.

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the 2nd March, 1883, the tenant of lands coming under the Act admitted that they were *ziraat* lands of the landlord; such admission is relevant and admissible as evidence, and falls under the words of the section—"Any other evidence that may be produced"; but its cogency or probative value must depend upon the facts and circumstances of each case.

The words "any agreement or compromise" in S. 120 (2) (*a*) of the Act mean only an agreement or compromise of a question in discussion as to the character of the land at the time when such agreement or compromise is made.

Nilmoni Chuckerbutti v. *Bykant Nath Bera,* (1890) I L R 17 C 466; *Sher Bahadur Sahu* v. *M.H.Mackenzie,* (1902) 7 C W N 400; *Sobhab Koeri* v. *Mahabir Prasad,* (Special Appeal No. 2129 of 1901 unreported); *Masudan Singh* v. *Gedar Nath Pandey,* (1905) 1 C L J 456, and *Ganpat Mahton* v. *Rishal Singh,* (1914) 20 C W N 14 referred to.

Bhagtu Singh v. *Raghunath Sahai* (1908) 13 C W N 135 approved.

Appeal from a decree of the High Court at Patna (Das and K. Sahai, JJ.) dated 9th January, 1923, reversing a decree of the Subordinate Judge of Arrah (P. N. Sen, Esq.) dated the 27th August, 1919.

The facts of the case, together with the history of the lands in dispute, appear from the judgment of their Lordships.

A. M. Dunne, K. C. and *S. Hyam* for appellant.—The *ziraat* character of the lands has not been proved, and even if they were *ziraat,* the respondent admittedly gave up the claim as such during the tenancy of George Fox, and treated the same as ordinary *raiyati* lands, and he cannot now be allowed to re-assert his claim as to *ziraat*. The appellant and his joint family have been in occupation of the lands as raiyats continuously for over 12 years, and acquired occupancy right therein, from which they cannot now be ousted except for causes (which have neither been alleged or proved) sanctioned by the Bengal Tenancy Act. The recitals in the Kabuliyats executed by the appellant's parents that the lands are *ziraat* are not conclusive as to their *ziraat* nature; nor are the statements in the various plaints filed on behalf of the appellant and his brother during their minority as to such *ziraat* character now binding on the appellant, or conclusive as to their true nature; and the High Court erred in holding that such statements "strongly support the plaintiff's case that the disputed lands are recognised by village custom as the proprietor's private lands." No such village custom was either pleaded or proved. The High Court also erred in holding that the evidence of transactions subsequent to the 2nd March, 1883, were legally admissible and came within the meaning of "any other evidence" in S. 120 (2) of the Bengal Tenancy Act as tending to establish the *ziraat* character of the lands. Fur-

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ther, the High Court erred in holding that the respondent, by granting occupancy right to George Fox, did not lose his title to the lands as *ziraat.*

L. de Gruyther, K. C., and *E.B.Raikes* for respondent. —A person taking a lease of *ziraat* lands as such, and agreeing in consequence that no right of occupancy could be acquired in these lands, is estopped, on the determination of his lease, from asserting the acquisition of such rights. The lands in question are *ziraat* lands, and always so recognised by village usage and otherwise. The grant of occupancy rights to Fox shows that the land till then was *ziraat,* and the grant did not change its character. The appellant and his brother took the lands as *ziraat,* and admitted by their lease that it was of that character, and are bound by that admission. The Subordinate Judge wrongly rejected in evidence, under S. 120 of the Bengal Tenancy Act, a copy of Fox's kabuliyat, the original being lost, as also oral evidence to prove that the lands were *ziraat*.

In the course of the argument, the cases mentioned in their Lordships' judgment were cited to their Lordships.

29th April, 1926. The Judgment of the Board was delivered by

Sir John Edge

SIR JOHN EDGE :—The suit in which this appeal has arisen was instituted on the 22nd December, 1917, in the Second Court of the Subordinate Judge of Arrah by the Maharaja of Dumraon for possession of lands in mauzas Majharia and Khutaha in the district of Shahabad by the ejectment of the defendants. It was alleged in the plaint that the milkiat interest of the Dumraon Raj in the 16 annas of each of the mauzas belongs to the plaintiff, and that his name stands recorded in respect thereof. The suit was brought against the two defendants Babu Parmeshwari Prasad Singh and his younger brother, Babu Bindeshri Prasad Singh, minors, Zamindars, sons of Babu Kesho Prasad Singh, deceased, under the guardianship of their mother, Musammat Radha Kuar. Kesho Prasad Singh and the defendants constituted until he died a joint Hindu Mitakshara family. The second defendant died a minor and without issue after the suit was brought.

The defence is that the defendants had a right of occupancy in the lands from which it was sought to eject them. If that right of occupancy existed, it was acquired under the Bengal Tenancy Act (VIII of 1885). The defendants were in possession, and under the circumstances of the

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case it was for the plaintiff to prove that he was entitled to eject them. Seven issues were framed: the third was the material issue. It was : "Have the defendants occupancy rights in the land in suit?" That issue practically depended on whether the plaintiff should succeed in proving that the lands in question were his *ziraat,* private lands, as the proprietor. The Subordinate Judge found that the lands were not *ziraat* land, and that the defendants had a right of occupancy in them, and made his decree dismissing the suit. From that decree the plaintiff appealed to the High Court at Patna, and the High Court finding that the defendants had no right of occupancy in the lands, reversed the decree of the Subordinate Judge, and gave the plaintiff the decree for ejectment and mesne profits which he claimed. From that decree of the High Court this appeal has been brought.

Before considering S. 120 of the Bengal Tenancy Act, 1885, which appears to their Lordships to be the section upon the true construction of which the fate of this appeal mainly depends, they will state, as briefly as may be, the history of the lands in question so far as that history is known to them.

All the lands in suit were in the bed of the river Ganges until shortly before 1843, but whether their position in the bed of the Ganges was owing to erosion or not their Lordships do not know. The lands to which the suit relates consists of 228 bighas, 11 kathas and 12 dhurs of land, which emerged from the Ganges shortly before 1843, and in 1843 became suitable for cultivation, and of 25 bighas, 14 kathas and 17 dhurs of land which in or shortly before 1902 emerged from the Ganges, and in 1904 were suitable for cultivation. The lands are contiguous, and were in the plaint alleged to be *ziraat* of the plaintiff.

In 1843 the Government, which was carrying on a stud farm, got possession of all the lands which had then emerged from the Ganges, and thenceforward for about 30 years cultivated them for the purposes of supplying food and fodder for the horses at the stud farm. It does not appear whether the Government held the lands under a written lease or under an oral agreement. The Government surrendered the lands to the Maharaja of Dumraon in 1873, and quitted possession of them. It is not suggested that the Government on or after quitting possession of the lands made any claim to any interest in them.

After the Government quitted possession the Maharaja of Dumraon let the lands which the Government had held to

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a Mr. Fox for a term of years, and in 1883 let them to Mr. Fox for a further term of nine years. The kabuliyat which Mr. Fox executed in 1883 is dated the 21st June, 1883, and in that kabuliyat Mr. Fox stated that he could "in no circumstances acquire occupancy right" in the lands, and that at the expiration of the term the proprietor (the Maharaja) "shall have full power to keep the said land as his (sir) *ziraat* or to settle it with me or any other person." It is stated in the plaint that "after some time Mr. Fox was granted occupancy rights" in the lands by the Maharaja. That statement was not traversed in the written statement, and must be treated as admitted. The grant or gift of such right of occupancy appears to have been, as stated in the judgment of Mr. Justice Das in 1891, for valuable services rendered to the Raj by Mr. Fox. A right of occupancy under the Bengal Tenancy Act, 1885, appears to be a statutory right, and is not conferred by a gift from a proprietor. However that may be, Mr. Fox became in arrear for three years in the payment of the rent of the lands, and in 1895 the then Maharaja brought a suit against him for the arrears of the rent, and obtained in that suit a decree. In execution of that decree Mr. Fox's right and title of the lands were, on the 2nd March, 1896, sold by auction, and were purchased by the Maharaja of Dumraon, and then such rights of occupancy, if any, as Mr. Fox had in the lands were extinguished.

After the 2nd March, 1896, the Maharaja of Dumraon let the lands to one Akhauri Ram Udanaj Singh in shikmi right for a term of five years, who cultivated them himself or by his shikmi tenants. Akhauri obtained no right of occupancy in the lands, and in any case the defendants are not his representatives by assignment or otherwise.

By 1902 the 25 bighas, 14 kathas and 17 dhurs of land had emerged from the Ganges and had become suitable for cultivation, and on the 25th November, 1902, all the lands in suit were let by Maharani Beni Prasad Kuari, proprietress and heiress, widow and executrix of Maharaja Sir Radha Prasad Singh of Dumraon, to Babu Kesho Prasad, the father of the defendants, for a term of seven years from 1309 to 1315 Fasli. A patta and kabuliyat were exchanged between the parties. In each of those documents the lands which were let were described as *ziraat* lands, and it was expressly agreed in each of them that no right of occupancy in favour of the tenant should accrue, that Kesho Prasad Singh was not entitled to transfer

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his interest in the lands to any other person, and that on the expiration of the tenancy the Maharani should be entitled to keep the land in her direct possession as *ziraat,* or to let it to any person. In the specification at the end of each document the land let was described as Jaiwala *ziraat* land. Kesho Prasad Singh remained in possession of the lands in suit under the patta and kabuliyat of the 25th November, 1902, until he died. Upon the death of Kesho Prasad Singh, his sons, the defendants, under the guardianship of their mother, Musammat Radha Kuar, continued in possession of the lands as cultivating tenants, except during a temporary dispossession from some of them by trespassers who had no title, until the expiration of the term of seven years for which the lands had been let to their father, Kesho Prasad Singh, in 1902.

In 1908 the lands in suit were in the charge, custody and management of the Court of Wards, and on the 8th December, 1908, Musammat Radha Kuar, the mother of the defendants, in her own name, but, in fact, on behalf of and in the interest of the defendants, took the lands in suit in temporary shikmi settlement for a term of nine years from 1316 to 1324 Fasli, and executed and gave to the manager of the Court of Wards a kabuliyat dated the 8th December, 1908, in which she declared that she made of her own free will and accord the declarations contained in it after fully understanding everything without any pressure brought to bear upon her by anybody. The kabuliyat contained several declarations. It is only necessary to refer to the fifth, seventh, ninth and tenth declarations.

The fifth declaration, so far as it is now material in this suit, was as follows:—

"It is incumbent on me that I should keep the aforesaid newly accreted *seer ziraat* land as it is at present and maintain the boundaries thereof. I neither have nor shall have any right whatsoever to make any alteration in connection therewith. I shall not allow anybody to encroach upon the aforesaid newly accreted *seer ziraat* land and shall give timely information to the manager."

"7. I have taken the aforesaid land in temporary *shikmi* settlement for the purposes of cultivation. I have no right either to plant or to get planted any tree or to construct a house, temple, mosque, dharamsala, or any other building and gola, etc. I shall not in any way change the status of the land whereby damage may be caused to the land and its productive power may be reduced and altered.

"I neither have nor shall have any right to give either the whole or a portion of the land to anybody in *shikmi* settlement or to transfer it in favour of any person without the manager's sanction in writing.

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"I have no right to the said land other than that of cultivation during the period of settlement, and I neither have nor shall acquire in future, occupancy or other rights to the same. After the expiry of the term of the lease, the manager of the estate shall have the right either to take it in *seer* possession, or to settle it with any other person, or to make such other management as he may think proper, and I neither have nor shall have any objection to the same.

"10. After the expiry of the term I shall surrender the aforesaid seer *ziraat* newly accreted land. Should I fail to do so, I shall be considered a trespasser for the period it will remain in my illegal possession, and I shall be liable for the payment of damages and compensation for that period."

On the expiration of the term of nine years the defendants refused to give up possession, and hence this suit.

The position in which Musammat Radha Kuar was when she executed the kabuliyat in 1908 was a difficult one, as she must well have known. The trespassers who had taken unlawful and forcible possession of some of the lands in 1906 were still in possession. In executing that kabuliyat of 1908 Musammat Radha Kuar must herself have understood the difficulties as to her own title and that of her sons, the defendants, to the lands in suit, or have had independent advice as to them and as to the kabuliyat which she should give to the manager of the Court of Wards.

As has been mentioned, in 1906, after the death of Kesho Prasad Singh, several persons who were mere trespassers and had no title to any of the lands in suit took forcible and wrongful possession of some of the lands in question in the suit, and ousted Musammat Radha Kuar and her sons, the defendants, and it became necessary for these defendants and their mother to obtain decrees in ejectment against the trespassers. In 1910 these defendants, under the guardianship of their mother, and their mother brought two suits in ejectment against the trespassers. In the plaints in each of those suits the lands are described as lands, the milkiat interest in which belonged to the Dumraon Raj, and the lands were stated to be *ziraat* lands, and to have been recognised as such by village custom. The Subordinate Judge who tried those suits found that the cases of all the defendants to those suits were false, that the defendants were mere trespassers, and that the lands were *ziraat* lands of the Dumraon Raj in the time of the Government stud-farm, that Mr. Fox had no occupancy right in the lands and was in possession of them by cultivating them and sub-letting them for short periods, and that Akhauri and the plaintiffs' father were in possession in the same way, and gave the plaintiffs decrees for possession. These decrees were obviously not collusive or obtained by fraud.

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In 1885 the Bengal Tenancy Act (VIII of 1885) was passed. It has been amended by the Bengal Tenancy (Amendment) Act, 1907 (Bengal Act No. I of 1907), by which sub-sec. (2*a*) became part of S. 120.

The lands in suit were an estate within the meaning of the Act, and the Maharaja of Dumraon is the proprietor of the estate within the meaning of the Act.

S. 120, as amended, is as follows :—

"(1) The Revenue Officer shall record as a proprietor's private land—

"(*a*) Land which is proved to have been cultivated as khamar (*ziraat,* sir) *nii*, *nijjot* (or kamat) by the proprietor himself with his own stock or by his own servants or by hired labour for twelve continuous years immediately before the passing of this Act, and

"(*b*) cultivated land which is recognised by village usage as proprietor's khamar (*ziraat*, sir) *nii*; *nijjot* (or kamat).

"(2) In determining whether any other land ought to be recorded as a proprietor's private land, the officer shall have regard to local custom, and to the question whether the land was, before the second day of March, 1883, specifically let as proprietor's private land, and to any other evidence that may be produced; but shall presume that land is not a proprietor's private land until the contrary is shown.

"(2*a*) Notwithstanding anything contained in any agreement or compromise, or in any decree which is proved to his satisfaction to have been obtained by collusion or fraud, a Revenue Officer shall not record any land as a proprietor's private land unless it is proved to be such by satisfactory evidence of the nature described in sub-section (1) or sub-section (2).

"(3) If any question arises in a Civil Court as to whether land is or is not a proprietor's private land, the Court shall have regard to the rules laid down in this section for the guidance of Revenue Officers."

Previous to that amendment (2) and (3) had been variously construed by different Benches of the High Court at Calcutta, none of which seem to have considered themselves bound by any previous decision on the subject by a Bench of that Court, and had not followed the constitutional principle of referring the question on which they differed from a previous decision of their own Court to a Full Bench to decide what, so far as the High Court was concerned, would be a binding decision on all the Benches of that Court. If such a question had been referred to a Full Bench, the Chief Justice would no doubt have appointed a Full Bench to consider such an important reference and to decide the question referred.

It is necessary for their Lordships to refer to these various decisions so far as they have been brought to their attention. They will now briefly do so.

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In 1890, in *Nilmoni Chuckerbutti* v. *Bykant Nath Bera*(1) Prinsep and Bannerjee, JJ., held that "any other evidence that may be produced" in sub-section (2) of S. 120 to show an assertion of any title on the part of the proprietor as to land as his private land must be an assertion communicated to the tenant before the 2nd March, 1883.

In 1902, in *Sher Bahadur Sahu* v. *M. H. Mackenzie*(2) Bannerjee and Pratt, JJ., held that the mere fact that the land having been taken in lease on the 23rd August, 1888, as *ziraat* would not give to that fact any probative value, as the lease was not before the 2nd March, 1883.

In *Sobhab Koeri and others* v. *Mahabir Prasad* (3), an unreported case, Mitra, J., appears to have taken a different view of the scope of S. 120.

In 1905 *Masudan Singh* v. *Goodar Nath Pandey* (4), which came before Harington and Mookerjee, JJ., in January and February, 1905, and was a suit in ejectment brought by a zamindar against a raiyat, and in which the defendant alleged that he had a right of occupancy in the lands, it was proved that he had admitted that the lands were kamat lands of the plaintiff. The Trial Court had dismissed the suit, but the Lower Appellate Court, whose findings of fact, but not of law, had to be accepted as final by the High Court in second appeal, had found on an admission made by the defendant that the lands were kamat lands, and had given the plaintiff a decree in ejectment. In that case Mr. Justice Harington, referring to Ss. 116, 120 and 178 of the Act, pointed out that the Court of first instance had found that the plaintiff had failed to prove that the defendant had held for a term or under a lease from year to year before the kabuliyat was made, in which was the admission that the lands were kamat lands, and held that the suit must be dismissed. Mr. Justice Mookerjee, treating kamat and *ziraat* as synonymous terms, and referring to *Nilmoni* v. *Bykant*(1), *Sher Bahadur* v. *Mackenzie*(2) and *Sobhab Koeri* v. *Mahabir Prasad* (3), observed that the question raised in the appeal before them, that is, that the admission made by the defendant in the kabuliyat was not admissible in evidence, was not free from doubt, and that it was not necessary to discuss it, as the appellant, the defendant, was entitled to succeed on another ground, and agreed that the suit should be dismissed.

1. (1890) I L R 17 C 466.
2. (1902) 7 C W N 400.
3. Special Appeal No. 2129 of 1901.
4. (1905) 1 C L J 456.

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The other ground need not be discussed by their Lordships, as it does not arise in this suit.

In 1908, in *Bhagtu Singh* v. *Raghunath Sahai* (5) which came before Mitra and Ball, JJ., on the 3rd July, 1908, in second appeal, the Lower Appellate Court had found that the land then in question was *ziraat* land, on an admission made by the tenant in a kabuliyat which was dated after the 2nd March, 1883. Mitra and Ball, JJ., held that the admission in the kabuliyat as to the character of the land was relevant evidence and admissible, and the question of its probative force was a question of fact for the Lower Appellate Court, and dismissed the appeal.

In 1914, in *Ganpat Mahton* v. *Rishal Singh* (6) Mookerjee and Beachcroft, JJ.; held that a statement made in a kabuliyat executed after the 19th September, 1902, being after the 2nd March, 1883, that the land was *ziraat*, was not admissible, not on the ground that it was not included in the expression "any other evidence that may be produced," but for the reason that when the Legislature expressly made evidence of letting before the 2nd March, 1883, in proof of the character of the land, admissible, the Legislature must have intended to exclude evidence of letting after the 2nd March, 1883, and they held that the defendants in that case must consequently be regarded as settled raiyats, as, in fact, they had been recorded.

Their Lordships agree with the construction of S. 120, before it was amended in 1907 by Bengal Act No. I of 1907, as adopted in 1908 by Mitra and Ball, JJ., in *Bhagtu Singh* v. *Raghunath Sahai* (5). Did the addition of (2*a*) by the amending Act make any and what difference so far as this appeal is concerned?

Sub-section (2) of S. 120, as their Lordships construe it, does not exclude as inadmissible evidence that subsequent to the 2nd March, 1883, the tenant admitted that the lands let to him were *ziraat* lands of the landlord; such an admission is relevant and admissible evidence, but it is probative evidence only, which, like any other relevant fact, has to be considered, and such weight given to it as under the circumstances of the case it is entitled to have. For instance, to put an extreme case, if it should appear to the Judge trying such a case that the admission was made contrary to the fact by a person anxious to obtain a lease of the lands from the landowner refusing

5. (1908) 13 C W N 135. 6. (1914) 20 C W N 14.

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to let unless the admission was made, its probative value would be worthless and might be disregarded; but if the admission were made in a case in which it was doubtful on the evidence whether the lands were the *ziraat* or sir lands of the proprietor, the admission might in the opinion of the Judge hearing evidence be valuable as enabling him to arrive at a conclusion on contradictory evidence of fact.

The question is ' What does (2*a*) of S. 120 mean? It is clear that land cannot be recorded as a proprietor's private land by reason of its having been decided to be such private land by a decree which was proved to the satisfaction of the Revenue officer to have been obtained from the Court by collusion or fraud. And it is also clear that nothing in such a decree can affect the character of the land if it is proved to the satisfaction of the Court in a suit of ejectment that the decree was obtained by collusion or fraud. But what is the meaning of "any agreement or compromise" in (2*a*) ?In their Lordships' opinion "any agreement or compromise" in (2*a*) must refer only to an agreement or compromise of a question in discussion as to the character of the land at the time when the agreement or compromise was made. If when land is let in Bengal or Bihar there is no doubt, and consequently no discussion or compromise as to the character of the land, it is difficult for their Lordships to understand why the agreement for letting of the land, lease, patta, or kabuliyat, which contains a statement of the character of the land, should not be admissible in evidence against a party to it. It does not therefore appear to their Lordships that sub-section (2*a*) displaces the view taken in the case of *Bhagtu Singh* v. *Raghunath Sahai* (5) which their Lordships have approved.

But quite apart from that and even if their Lordships had taken a strict view in favour of the appellant of S. 120 the Bengal Tenancy Act, 1885, as it now stands, and irrespective of the patta of 1902 and the kabuliyats of 1883 and 1892, still having regard to the facts that the lands which the Government held for 30 years were used by the Government for similar purposes as they would have been used by the Maharaja of Dumraon if he had been the owner of a stud farm, that no one claimed any right in any of them as a settled raiyat or, except trespassers without any title, as having an occupancy right in any of them, and to the

5. (1908) 13 C W N 135.

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statements as to the character of the land by the defendants and their mother in the plaints of 1910, when they were plaintiffs in the suits against trespassers to which their Lordships have referred, and to the kabuliyat given in 1908 by Musammat Radha Kuar to the manager of the Court of Wards, their Lordships find that there was ample admissible evidence that the lands were *ziraat* of the Dumraon Raj, and that the defendants had no right of occupancy in them.

Their Lordships will accordingly humbly advise His Majesty that this appeal should be dismissed with costs, and that the decree of the High Court should be affirmed.

Solicitors for appellant : *Barrow, Rogers* and *Nevill.*

Solicitors for respondent : *Watkins* and *Hunter.*

A. de M. *Appeal dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE DEVADOSS AND MR. JUSTICE WALLACE.

Moideen Bibi Ammal by agent
Montana Sahib ... *Apellant in both** (*Plaintiff*)
v.
Rathnavelu Mudali ... *Respondent in both* (*Defendant*).

Moideen Bibi Ammal v. Rathnavelu Mudali.

Mahomedan Law—De facto *trustee*—Locus standi *to sue for rent*—*Woman, whether can be mutawalli.*

A *de facto* mutawalli of a mosque is not unknown to Mahomedan Law and such a person can maintain a suit against the tenant for rent. *Abbas Sahib* v. *Soran Bivi Saiba Ammal,* (1913) I L R 38 M 260: 28 M L J 347 referred to.

Under Mahomedan Law a woman can be the *de facto* mutawalli of a mosque and do the temporal duties attached to the office.

Appeals against the decree of the District Court of Chingleput in A.S.Nos.101 and 102 of 1922 respectively preferred against the decrees of the Court of the District Munsif of Poonamallee in O. S. Nos. 585 of 1920 and 638 of 1921 respectively.

V. N. Shama Rao for appellant.

S. Rajagopalachari for respondent.

The Court delivered the following

JUDGMENT :—These Second Appeals are against the decision of the District Judge of Chingleput in a judgment

*S A Nos. 1142 and 1143 of 1923. 2nd September, 1926.

which disposes of two appeals presented against the judgments in two original suits. The two suits were for recovery of *melvaram* due on land of which the defendant is a tenant for faslis 1328, 1329 and 1330. The plaintiff's case is that she is a muttawalli or trustee of the mosque institution and that defendant is her tenant on a part of the mosque property and as such is bound to pay *melvaram*. The defendant's contention was, first, that there is no mosque in existence, and second; that the plaintiff is not the *de jure* muttawalli or trustee and is therefore not entitled to claim rent from him. He also pleads that the matter of this appeal is *res judicata*.

To take the last point first, on 3rd March, 1923 in a subsequent suit by the plaintiff against the defendant for rent for fasli 1331 the District Munsif pronounced a judgment in the plaintiff's absence, her pleader having no instructions, dismissing the suit. He went, however, into the merits of the pleas and decided, following the findings in the District Judge's judgment now under appeal, that there is no mosque in existence now and that plaintiff has nothing to do with any such mosque so as to enable her to maintain the suit. This judgment has not been appealed against and is now final so far as it goes. It was delivered four months before the presentation of this appeal. But it is clear that in that suit the District Munsif only decided, and it was sufficient for the purpose only to decide; that in fasli 1331 there was no mosque in existence of which the plaintiff could be trustee. It is not a decision that prior to fasli 1331 there was no mosque. In the present appeal we are concerned with faslis 1328 to 1330 and there is in our view no final finding that in these faslis there was no mosque of which the plaintiff could be trustee. The plea of *res judicata* therefore fails.

The next point is whether there is in fact a mosque in the sense of a trust institution. Defendant claims that, since what is now called the mosque is not situated on the same site as the original mosque was situated, which is not denied, the trust has vanished. The validity of this argument depends entirely on the nature of the trust. If the trust was to maintain a particular building already existing on a particular site, then with the disappearance of the building the trust might vanish. That is not the present case. Here, as we see from the Inam Register, the trust was for the maintenance of a mosque in this village. Clearly, for the fulfilment of that trust it does not matter where the mosque is so long as it

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is in the village, and to lay down that the trust cannot change the site of the mosque, however unsuitable it may be or become or even when the site has been taken from the trust, say, by acquisition by Government or by an act of God, would be absurd. If it is to the benefit of the institution to change the site of the actual building the trust is entitled to change it. It is not urged in this case that a single person interested in the maintenance of the mosque has objected or does object to the change of site. The only objection comes from a Hindu tenant who objects to pay his rent and is seeking an argument for not paying it. There is no doubt on the evidence that there is a separate building set apart, across the lane from the plaintiff's dwelling house, for this mosque. There is therefore no failure to maintain the trust institution for which the inam was granted. We are unable to agree with the District Judge that the present mosque is not the mosque for which the inam is granted, if by that finding he means that the trust has vanished. This contention therefore also fails.

The next contention is that the plaintiff is neither *de facto* nor *de jure* muttawalli and is therefore not entitled to sue for the rent. It was admitted before the District Judge that the plaintiff is not the *de jure* trustee. That the plaintiff is the *de facto* muttawalli in the sense that she is looking after the temporal affairs of the trust cannot we think be doubted. Defendant's contention on this part of the case was not seriously pressed before us. The plaintiff's agent is paying the mosque servant P.W. 3 and it is plaintiff and no one else who has been attempting to recover the rents from the defendant ever since the death of her husband, the previous muttawalli.

A more serious argument for the defendant is that the Muhammadan Law does not contemplate a *de facto* trustee at all, and that such a person has no *locus standi* to sue for rent. That view the District Judge adopted and this question is the main question for decision here. In the recognised text books of Muhammadan Law we do not find any statement that a *de facto* trustee is a legal impossibility The nearest statement on the point is by Mr. Tyabji in his work on Muhammadan Law at page 627 which sets out that a person not validly entitled to act as muttawalli may, by taking charge of it and purporting to manage the property, thereby become a trustee *de son tort* and answerable as such. If this is so, it implies that the concept of a *de facto* trustee or

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trustee *de son tort* is not foreign to Muhammadan Law, and that such a trustee may perform the duties of the *de jure* trustee, but will be answerable as if he was, as he is, a trustee *de son tort*. In the case reported in *Niamat Ali* v. *Ali Raza* (1) two learned Judges of the Allahabad High Court who have frequently to deal with cases under Muhammadan Law speak of the *de facto* muttawalli of an Arabic school without hinting that such an office is legally inconceivable. In two other cases of the same High Court, reported in *Benarsi* v. *Altaf Hussain* (2) and *Muizuddin* v. *Mohammad Ikhlaq* (3) *de facto* muttawallis of mosques are spoken of as if they were well known to the law. No case to the contrary has been cited before us, and we therefore, as at present advised, see no difficulty in the legal concept of a *de facto* muttawalli of a mosque. Plaintiff is no doubt a woman, but there is no objection under Muhammadan Law to a woman doing the temporal duties of muttawalli of a mosque. There is no suggestion that she is not doing the duties properly, or that any person interested in the mosque has made any complaint regarding her performance of her duties. The only suggestion that she is not entitled to perform these duties comes from this defendant who, as we have noted, is unwilling to pay his rent to her and is obviously a self-interested party. It is not alleged by him that there is any other person who ought to be the trustee to whom his rent is due. In these circumstances we cannot see on what ground the defendant can refuse to pay his rent. The plaintiff is the actual manager of the institution. No other person has been alleged to be entitled to manage it. There is no suggestion that she will not appropriate the rent for the benefit of the institution.

Nor can we see any legal objection to her maintaining a suit against the tenant for rent. In a case reported in *Abkan Sahib* v. *Soran Bivi Saiba Ammal* (4) both the learned Judges held that the *de facto* trustee of a mosque was in a position to collect the rents and reimburse himself for the expenses of the collection out of the rents collected. It would be very much to the detriment of a trust if the actual manager thereof, when there is no *de jure* trustee in charge, were debarred from recovering debts due to the trust. The rent so paid is of course paid to the person properly under the circumstances entitled to receive it. We therefore can see no

1. (1914) I L R 37 A 86 at 90.
2. (1921) 63 I C 171. 3. (1923) 74 I C 756.
4. (1913) I L R 38 M 260: 28 M L J 347.

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legal ground on which the defendant can refuse to pay his rent to the plaintiff. We must reverse the judgment of the learned District Judge and restore that of the District Munsif with costs of the plaintiff here and in the Lower Appellate Court (one set vakil's fee).

N. S. —— *Second Appeal allowed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE WALLACE.

P. Varadarajulu Naidu ... *Petitioner** (*Complainant*)

v.

P. Kuppuswami Naidu ... *Respondent* (*Accused*).

Varadarajulu Naidu *v.* Kuppuswami Naidu.

Criminal Procedure Code, Ss. 202 and 203—Magistrate issuing notice to accused to appear without hearing the complainant's case—Legality of.

Under S. 202 of the Criminal Procedure Code, the accused is not to be called upon to appear and show cause unless and until the Magistrate has satisfied himself from the complainant and his witnesses that there is a *prima facie* case against him. There is no warrant for the procedure adopted by a Magistrate in issuing notice to the accused to appear and show cause against the issue of process before hearing the complainant's case or his witnesses, hearing what the accused has to say and then deciding whether the complaint shall be received or not. *In the matter of the petition of Dukhi Kewat,* (1906) I L R 28 A 421 not followed. *In re Tukaram Udaram* (1904) 6 Bom. L R 91 distinguished. *Shaik Meeran Sahib* v. *Ratnavelu Mudali* (1912) I L R 37 M 181: 25 M L J 1 followed. *Baidya Nath Singh* v. *Muspratt* (1887) I L R 14 C 141; *Bhim Lal Sah* v. *Emperor* (1912) I L R 40 C 444; *Balai Lal Mukerjee* v. *Pasupathi Chatterjee* (1916) 21 C W N 127; *Chandi Charan Mitra* v. *Monundra Chandra Roy Choudhury,* (1922) 27 C W N 196 and *Bechu Mia* v. *Anwar Nabi* (1924) 30 C W N 312 referred to.

Petition under Ss. 435 and 439 of the Code of Criminal Procedure, 1898, praying the High Court to revise the order of the Third Presidency Magistrate, Georgetown, Madras, dated 4th May, 1925, in Application No. 3172 of 1925.

V. L. Ethiraj for petitioner.

K. P. Krishna Menon for *Crown Prosecutor* on behalf of the Crown.

O. Thanikachalam Chettiar for accused.

The Court made the following

ORDER :—This is a criminal revision case against the order of the Presidency Magistrate dismissing a complaint under S. 203, Criminal Procedure Code. The chief ground of attack is that the Magistrate has ignored the proper procedure under Ss. 202 and 203 and adopted a procedure for which there is no warrant and which is in many ways open to objection.

*Cr R C No. 578 of 1925
(Cr R P No. 487 of 1925) 11th March, 1926.

Varadarajulu Naidu v. Kuppuswami Naidu.

It appears that the procedure is one which has been for many years in practice in that Court. It is that when a complaint is put in and sworn to, the Magistrate without hearing the complainant's case or his witnesses issues notice to the accused to appear and show cause against the issue of process, hears what the accused has to say, examines any witness he wishes to have examined and then decides whether the complaint shall be received or not.

It is argued that this procedure is justified by S. 202. It may be said that it is not prohibited by the letter of that section but it is clearly contrary to the spirit of that section and to the general principles of the Code. Section 202 clearly implies that an accused is not to be troubled unless the Magistrate is first satisfied that the complaint is *prima facie* true, and therefore the case is made out which the accused must rebut. To call upon an accused to appear and disclose his defence before the Magistrate has satisfied himself that the complaint is *prima facie* true is contrary to the spirit of the whole procedure of criminal trials. It is no justification to say that the accused is willing to adopt that procedure, because if he refused to adopt it, he will do so at his peril and the Magistrate would at once conclude that there was a good case against him. It is a procedure most unfair to the accused. He is in effect compelled not only to state, but to substantiate his defence, before the prosecution has substantiated any case against him, and this is the exact opposite of the principle underlying the prescribed procedure. It is not until the prosecution case has been fully and thoroughly put forward and tested by cross-examination that the accused is to be called upon to put forward his defence. Under the procedure now adopted if the Magistrate rejects the defence and considers that there is a case to go on with, then the accused has to put his case forward before a Magistrate who has already rejected his defence. From this point of view alone the procedure is indefensible.

It is no less unfair to the prosecution. The result, I suppose, in a majority of cases is that the complaints are thrown out without the complainant having been allowed to put forward his full case at all. The Magistrate accepts the defence before he knows what the full prosecution is.

The meaning of S. 202 is perfectly clear. It is that the accused is not to be called upon to appear unless and until the Magistrate has satisfied himself from the complainant and his witnesses that there is a *prima facie* case against him.

This procedure has been condemned by this Court so far back as 1912 in *Sheik Meeran Sahib* v. *Ratnavelu Mudali* (1) where Bakewell, J. remarks :—

"It appears to me that the object of the procedure prescribed by Chap. XVI, which is entitled "Of Complaints to Magistrates," is the separation of unfounded from substantial cases at the outset, and to prevent innocent persons from being brought into the Police Courts and subjected to the annoyance of frivolous charges."

See also Criminal Revision Case No. 123 of 1925, which is also a case from the Presidency Magistrate's Court.

Such a practice has frequently been condemned by the Calcutta High Court. See *Baidya Nath Singh* v. *Muspratt* (2), *Bhim Lal Sah* v. *Emperor* (3), *Balai Lal Mukerjee* v. *Pasupathi Chatterjee* (4), *Chandi Charan Mitra* v. *Monundra Chandra Roy Chowdhury* (5) and *Bechu Mia* v. *Anwar Nabi* (6). I note that the decision in *Baidya Nath Singh* v. *Muspratt* (2) has been dissented from by a single Judge in *In the matter of the petition of Dukhi Kewat* (7). This latter case and *In re Tukaram Udaram* (8) are the only cases that the respondent has been able to put before me in his favour. *In re Tukaram Udaram* (8) the point was whether the issue of process to the accused for the purpose of enquiry under S. 202 meant that the trial had begun and the propriety of the issue of that process was not discussed.

The ruling of this Court in *Sheik Meeran Sahib* v. *Ratnavelu Mudali* (1) so far back as 1912, referring to the procedure in the Presidency Magistrate's Court does not seem to have had any effect in putting a stop to this practice. It is time therefore that this undesirable practice should cease and it will not cease until the Magistrates are in each case compelled to do over again what they have done improperly.

I am of opinion that the complainant has not had a fair hearing of his case, that he is entitled under S. 202 to have that case reconsidered and I remand the case for that purpose. I reverse the Magistrate's order and direct him to re-hear the complaint. It is hardly necessary to add that the statement of the accused and his witnesses which have been now taken cannot be treated as evidence at the re-hearing.

N. S. *Order set aside and case remanded for rehearing.*

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1. (1912) I L R 37 M 181 : 25 M L J 1.
2. (1887) I L R 14 C 141.
3. (1912) I L R 40 C 444.
4. (1916) 21 C W N 127.
5. (1922) 27 C W N 196.
6. (1924) 30 C W N 312
7. (1906) I L R 28 A 421.
8. (1904) 6 Bom. L R 91.

[FULL BENCH.]

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—SIR MURRAY COUTTS TROTTER, *Kt., Chief Justice*, MR. JUSTICE DEVADOSS AND MR. JUSTICE WALLACE.

Appa Rao Mudaliar ... *Petitioner* (Accused)*

v.

Janakiammal ... *Respondent (Complainant).*

F. B.

Appa Rao Mudaliar *v.* Janakiammal

Criminal Procedure Code (V of 1898), Ss. 202, 203, 204 and 436—Investigation under S. 202—Jurisdiction of Magistrate to require the presence of the accused—Dismissal of complaint under S. 203—Whether amounts to a discharge of the accused—Order of further enquiry—Notice to accused, whether necessary.

A Magistrate has no jurisdiction to require the presence of the accused when he holds an enquiry or investigation under S. 202 of the Criminal Procedure Code into a complaint of which he is empowered to take cognizance or which has been transferred to him under S. 192. *Varadarajulu Naidu* v. *Kuppuswami Naidu*, (1926) 51 M L J 602 followed.

An order under S. 436 of the Criminal Procedure Code for further enquiry into a complaint dismissed under S. 203 is not bad for want of notice to the accused, as the dismissal of the complaint does not amount to a discharge of the accused.

Per Devadoss, J.—The expression "person who has been discharged" in S. 436 refers to a person who has been discharged under Ss. 209, 253 or 259. A person against whom no process has been issued under S. 204 is not a discharged person and therefore no notice is necessary to him when the District Magistrate or the Sessions Court or the High Court directs further enquiry into a complaint dismissed under S. 203 or sub-section 3 of S. 204.

Emperor v. *Gajraj Singh*, (1924) I L R 47 A 722 followed.

Petition under Ss. 435 and 439 of the Code of Criminal Procedure, 1898, praying the High Court to revise the order dated 1st December, 1925 of the District Magistrate of Chingleput in Cr. R. C. No. 45 of 1925 (C. C. No. 443 of 1925 on the file of the Court of the Stationary 2nd Class Magistrate of Ponneri).

K. Narasimha Aiyar for petitioner.

N. A. Krishna Aiyar and *R. Viswanatha Aiyar* for respondent.

The Public Prosecutor on behalf of the Crown.

The Court made the following

Coutts Trotter, C. J.

ORDER :—*The Chief Justice* :—I have had the advantage of perusing the judgment about to be delivered by my brother Devadoss and I entirely agree in the conclusion that he has arrived at, a conclusion which was also arrived at by Wallace,

*Cr R C No. 790 of 1925
(Cr R P No. 649 of 1925) 29th April, 1926.

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Coutts Trotter, C. J.

J., in *Varadarajulu Naidu* v. *Kuppuswami Naidu* (1). As I also find myself in complete accord with the reasoning of those learned Judges, it is unnecessary for me to add more than a few words. It may no doubt happen from time to time that to allow a proposed accused person to appear and to hear what he has to say while the proceedings are at the stage contemplated by S. 202 of the Criminal Procedure Code might turn the scale and satisfy the Magistrate that there was no case for issuing process under S. 204. I make no doubt that it is in this view that Magistrates have been in the habit of giving a person against whom a charge is formulated at least an option to come before them if he so desires at the earliest stage. It seems to me that such a procedure is entirely unwarranted by the Code. The object of the chapter of the Code in which S. 202 appears is to prevent accused persons being harassed at all or asked to appear if in the opinion of the Magistrate no *prima facie* case is made out, and in my opinion the Code never contemplated that at that stage they should be either asked or permitted to state their cases. That is really enough to dispose of this matter, but I am also of opinion that the practice of summoning accused person at the stage marked by S. 202 has much greater dangers than safeguards to the accused. He is obviously not bound to appear even if invited or given an opportunity of doing so. If he does not appear, it is likely to weigh against him with the Magistrate; if he does he runs the danger of being committed to a statement of his case before he knows with any definiteness what exactly is laid to his charge. The argument that because Mr. Narasimha Aiyar's client in fact appeared before the Magistrate when the proceedings were at the stage of preliminary inquiry under S. 202, he is therefore entitled to be heard when that proceeding is questioned in a higher Court is to my mind quite untenable. This appellant has never been discharged because he had never been charged.

I should like to say in conclusion that I entirely endorse the strictures passed by Devadoss, J., on the remarks contained in the order of the District Magistrate which in effect really prejudge the case. I agree with the order proposed by Devadoss, J.

Devadoss, J.

Devadoss, J.:—This is an application to revise the order of the District Magistrate of Chingleput directing further enquiry into a complaint dismissed under S. 203 of the Criminal

1. (1926) 51 M L J 602

Procedure Code by the Stationary Second Class Magistrate of Ponneri. At the request of the Public Prosecutor the learned Chief Justice has directed that this Criminal Revision Petition be heard by a Full Bench as one of the questions involved affects the practice prevailing in the Magistrates' Courts. Two questions arise for consideration: (1) Has a Magistrate jurisdiction to require the presence of the accused when he holds an enquiry or investigation under S. 202 of the Criminal Procedure Code into a complaint of which he is empowered to take cognizance or which has been transferred to him under S. 192? and (2) Is an order under S. 436 of the Criminal Procedure Code for further enquiry into a complaint dismissed under S. 203 bad for want of notice to the accused?

First point:—When a complaint is presented or transferred to a Magistrate, he may, after examining the complainant on oath, dismiss the complaint under S. 203 if there is in his judgment no sufficient ground for proceeding, and if there is sufficient ground for proceeding he shall issue a summons or warrant under S. 204 for the attendance of the accused. Section 202 authorises a Magistrate for reasons to be recorded in writing to postpone the issue of process for compelling the attendance of the person complained against, and either enquire into the case himself, or direct an enquiry or investigation to be made by a Magistrate subordinate to him, or by a police officer, or by such other person as he thinks fit, for the purpose of ascertaining the truth or falsehood of the complaint. The object of S. 202 is to prevent the harassing of innocent persons by an indiscriminate issue of processes in cases where there is no sufficient ground for proceeding against them. Unless and until a Magistrate is satisfied that there is in his judgment sufficient ground for proceeding, he should not compel the appearance of the accused before him. It is to enable him to see that there is sufficient ground for proceeding that he is authorised to hold an enquiry by himself or by a Subordinate Magistrate or by a Police Officer or by any other fit person. The object of the section would be defeated if the accused is made to appear in an enquiry under S. 202. It is argued that the notice issued under S. 202 to the accused gives him an option to appear or not, and therefore it cannot be said that the Court compels his appearance when it issues notice to him under S. 202; but the option is rendered useless as his non-appearance might be construed into a disinclination

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on his part to be present at the enquiry and might create a prejudice in the mind of the Magistrate against him, and if he appears the object of the postponement of the process is practically nullified. Should the Magistrate after such enquiry think that there is in his judgment sufficient ground for proceeding, any statement made by him might prejudice him in the trial of the case, and if he declines to answer any question that may be put to him by the Magistrate, that might prejudice the Magistrate against him. This question has been exhaustively considered by my brother Wallace in a recent case, in *Varadarajulu Naidu* v. *Kuppuswami Naidu* (1), and as I entirely agree with his conclusion and the reasons therefor, it is unnecessary to discuss the cases noticed by him. I hold that the practice of issuing notice to the accused under S. 202 is not only illegal but is highly undesirable as it defeats the specific object of S. 202 and might prejudice the accused if the complaint is not dismissed under S. 202 and should therefore be put a stop to without delay.

Second point :—The proviso to S. 436 of the Criminal Procedure Code makes it clear that a person is entitled to notice before an order is made under that section if he has been discharged. When an accused person has not been discharged according to the provisions of the Criminal Procedure Code, he is not entitled to notice when the District Magistrate or the Sessions Court or the High Court orders further enquiry into a complaint which has been dismissed under S. 203, or sub-sec. 3 of S. 204. Mr. Narasimha Aiyar's contention is that in this case his client appeared before the Magistrate on a notice under S. 202 and as the complaint was dismissed, he must be considered to have been discharged. The dismissal of a complaint under S. 203 or sub-sec. 3 of S. 204 is before the appearance of the accused, and no accused person can be said to be discharged when no process has been issued for his appearance. It is only where a Magistrate taking cognizance of an offence is of opinion that there is sufficient ground for proceeding, he issues a summons or warrant for the attendance of the accused. If the case is a summons case the trial is according to Chap. XX and when a complaint in a summons case is thrown out the accused is acquitted. In warrant cases the inquiry and trial are under Chap. XXI and under S.253, if the Magistrate finds that no case has been made

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out against the accused which, if unrebutted, would warrant his conviction he shall discharge him. An accused person is said to be discharged when the case against him is thrown out under Ss. 209, 253 or 259, or when the Advocate-General enters a *nolle prosequi* under S. 333. The expression "person who has been discharged" in S. 436 refers to a person who has been discharged under Ss. 209, 253 or 259. A person against whom no process has been issued under S. 204 is not a discharged person and therefore no notice is necessary to him when the District Magistrate or the Sessions Court or the High Court directs further enquiry into a complaint dismissed under S. 203 or sub-section 3 of S. 204. The same view was held in *Emperor* v. *Gajraj Singh* (2). The answer to the second question is in the negative.

Mr. Narasimha Aiyar very properly contends that his client would be prejudiced by certain remarks of the District Magistrate in his order. He calls a letter produced by the accused as a spurious letter. The evidence on record does not warrant such an opinion of the letter. Again, the observation "Accused was certainly liable for trespass, insult and assault as complained by the complainant" is tantamount to a finding that the accused is guilty. Without the evidence of both sides it is not proper for any Court to come to a definite conclusion that an accused person is guilty of an offence. The Stationary Sub-Magistrate followed the practice which, though condemned by a decision of this Court reported in *Sheik Meeran Sahib* v. *Ratnavelu Mudali* (3) seems to be in vogue throughout the Presidency and there is no reason for transferring the case for further enquiry to another Magistrate. Any Magistrate who enquires into this case will ignore the observations of the District Magistrate as regards the merits of the case and come to a conclusion on the evidence that might be adduced before him as to the guilt or the innocence of the accused. There is no reason to interfere with the order of the District Magistrate except setting aside that portion of the order by which the case is transferred to the Taluq Magistrate of Ponneri.

The case will be enquired into by the Stationary Sub-Magistrate of Ponneri who, if he thinks proper, may hold an enquiry under S. 202 before issuing process to the accused in order to satisfy himself that there is sufficient ground for proceeding. If he is not satisfied he may dismiss the com-

2. (1924) I L R 47 A 722. 3. (1912) I L R 37 M 181: 25 M L J 1.

F. B.

Appa Rao Mudaliar v Janakiammal.

Wallace, J.

plaint under S. 203; if he is satisfied that there is sufficient ground for proceeding he shall issue process under S. 204.

Wallace, J. :—I entirely agree. On the first point I have already said all that I wish to say in my judgment in *Varadarajulu Naidu* v. *Kuppuswami Naidu* (1).

On the second point I agree that an accused to whom a process has not issued under S. 204 (1) has not "appeared" at the proceedings contemplated by Chapters XVIII and XXI and therefore cannot claim that a dismissal of the complaint under S. 203 of the Code of Criminal Procedure amounts to a discharge.

N. S. *Order of the District Magistrate partly set aside.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE JACKSON.

Chandana Venkatasubbayya ... *Appellant** (*1st deft.*)

v.

Gada Seshayya and others ... *Respondents* (*Plaintiff and defendants Nos. 2 and 3*).

Venkatasubbayya v. Seshayya.

Limitation Act (IX of 1908), S. 20—"Agent duly authorised"—Amount deposited to the credit of the plaintiff in a suit—Payment of this amount by Court under O. 21, R. 56 of the Civil Procedure Code to a person who had obtained a decree against the plaintiff's son—Whether can be construed as payment by the agent of the plaintiff's son.

In O. S. No. 6 of 1911 there was deposited a certain amount to the credit of the plaintiff *C. V.* This sum was attached before judgment by one *S* who in O.S.No.57 of 1918 was suing *C. V.'s* son on a pronote executed by *C. V.* After obtaining a decree in O. S. No. 57 of 1918, *S* applied under O. 21, R. 56 of the Civil Procedure Code to have the amount deposited in O. S. No. 6 of 1911 paid over to him and the same was paid to him.

Held, that this payment by Court cannot be construed as one made by the "duly authorised agent" of *C.V.'s* son within the meaning of S. 20 of the Limitation Act, inasmuch as the mere fact that the Court held moneys belonging to *C. V.*, the debtor's father, could not constitute that Court the agent of the debtor (*C. V.'s* son) in the absence of any communication with the debtor. *Govindaswami Pillai* v. *Dasai Goundan*, (1921) I L R 44 M 971 : 41 M L J 423 referred to.

If a debtor's presumable assets are so placed by operation of law, viz., a legal attachment, that a Court can release them for the purpose of making

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*A A A O No. 27 of 1925. 13th August, 1926.

1. (1926) 51 M L J 602.

payments due from him, then the act of the Court in making such payment must be treated as the act of the debtor himself, the volition of the debtor being neither requisite nor relevant.

Appeal against the order of the Court of the Additional Subordinate Judge at Masulipatam in A. S. No. 65 of 1924 (A. S. No. 131 of 1924 on the file of the District Court of Kistna) preferred against the order of the Court of the District Munsif of Avanigadda at Masulipatam in E. P. No. 258 of 1923 in O. S. No. 57 of 1918.

K. Subba Rao for *V. Ramadoss* for appellant.

A. Venkatachellam for respondents.

The Court delivered the following

JUDGMENT :—Appeal against the order of the Court of the Additional Subordinate Judge of Masulipatam in A. S. No. 65 of 1924 (E.P. No. 258 of 1923 on the file of the Court of the District Munsif of Avanigadda at Masulipatam).

The decree-holder in O. S. No. 57 of 1918 filed an execution application on 26th June, 1922. The previous application was on 20th January, 1919.

In order to save the bar of limitation the decree-holder relies upon a payment under O. 21, R. 56 made on 31st October, 1919, alleging that such payment is tantamount to a payment by the debtor's agent duly authorised in this behalf as contemplated by S. 20 of the Indian Limitation Act.

The question for determination is whether this payment can be described as such.

In O. S. No. 6 of 1911 on the file of the Bandar Additional District Munsif there was deposited a sum of Rs. 514 to the credit of the plaintiff, Chandana Veeraswami. This sum was attached before judgment by the present respondent Seshayya who in O.S.No. 57 of 1918 was suing (along with his heirs) Veeraswami's son, the present appellant, on a pronote executed by Veeraswami. After obtaining a decree in O.S. No. 57 of 1918 Seshayya applied under O. 21, R. 56 to have the Rs. 514 paid over to him. The District Munsif observed on this application E. A. No. 2129 of 1919:

"I don't consider notice to decree-holder (that is, Veeraswami) or judgment-debtor (that is, judgment-debtor in O. S. No. 6 of 1911) necessary under R. 179 of the Rules of Practice. The judgment-debtor has now no interest, and decree-holder's sons are defendants in O. S. No. 57 of 1918, in which this amount was attached before judgment. Issue cheque."

This is the payment alleged by respondent to have been one made by the debtor's agent duly authorized in this behalf.

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Now to make good that allegation he must establish that the Court when it made this payment was employed to do the act for the debtor, or to represent the debtor in dealings with third persons. In the present case the Court had never at any time come into direct relations with the debtor. It was only seized of property which the respondents alleged to be the property of the debtor's father. In such circumstances can the Court be held to be the debtor's agent? No doubt there are circumstances when a Court occupies this position. It was held in *Chinnery* v. *Evans* (1) that any payment made by a Receiver in pursuance of the order is payment in law by the legal agent of the person liable to pay. In *Govindaswami Pillai* v. *Dasai Goundan* (2) this ruling was applied to a case where purchase money under the Land Acquisition Act was deposited in Court by Government to the credit of the suit, and a decree-holder-mortgagee by consent of the judgment-debtors drew out a sum in satisfaction of his decree. In this case Coutts Trotter, J., stated the following formula :—

> "If a debtor's assets are so placed either by his own act or by operation of law, that if some other than he alone can release them for the purpose of making payments due from him, then the act of that other in operating upon the debtor's assets must be treated as the act of the debtor himself, the volition of the debtor in such a case being neither requisite nor relevant."

Restated with reference to the facts of the present case this formula would run : If a debtor's presumable assets are so placed by operation of law, viz., a legal attachment, that the Court can release them for the purpose of making payments due from him, then the act of the Court must be treated as the act of the debtor himself, the volition of the debtor being neither requisite nor relevant. The difficulty then becomes apparent. Can it be said that the volition of the debtor is neither requisite nor relevant when a Court is paying out moneys belonging to his father on the assumption that they are the assets of himself? The mere fact that a Court holds moneys belonging to a debtor's father cannot in my opinion constitute that Court the debtor's agent. There must be some communication with the son. As observed by Sadasiva Aiyar, J., in the same case [*Govindaswami Pillai* v. *Dasai Goundan* (2)] it may not be altogether clear why the legislature has insisted that the payment shall be by the person or his agent authorized. If there is no fiction, as in English Law, that the payment implies a fresh promise to pay, and the provision is merely in order to exact diligence from the decree-holder, such diligence might

1. (1864) 11 H L Cas. 115. 2. (1921) I L R 44 M 971 at 974: 41 M L J 423.

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be exercised quite independently of the debtor's volition. In the present case the mere fact that the creditor moved the Court and obtained the money under attachment would satisfy the requirement of diligence. But whether it be logical or illogical the statute does seem to require the volition of the debtor or his agent in this matter. It must be strictly found that the judgment-debtor did exercise his volition or that the circumstances were such that his volition was neither requisite nor relevant. I do not find that the requirements of S. 20 of the Indian Limitation Act have been satisfied and the appeal is allowed with costs throughout.

N.S. *Appeal allowed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—SIR KUMARASWAMI SASTRI, *O. C. J.*, AND MR. JUSTICE CURGENVEN.

Dhurvas J. Subbayyar & Bros. by one of its partners Dhurvas J. Subbayyar ... *Appellants** (*Defendants*)

v.

J. K. Munuswami Aiyar & Sons by their managing partner Jambu Subbarama Aiyar ... *Respondents* (*Plaintiffs*).

Subbayyar & Bros. v. J. K. Munuswami Aiyar & Sons.

Provincial Insolvency Act (V of 1920), Ss. 2 (a), 28, 33, 49, 50 and 59—Suit by vendor against purchaser for damages for breach of contract—Counter-suit by the purchaser against the vendor for recovery of the deposit amount—Decrees dismissing the purchaser's suit and decreeing the vendor's suit—Appeals by the purchaser—Insolvency of the purchaser—Right of Official Receiver to continue the appeals—Proper remedy of the Receiver—"Relating to the property of the insolvent" in S. 59 (d)—Meaning of—"Debt" whether includes "decree debt"—Contract—Deposit—Party in default—Right to sue for recovery of the deposit.

A suit was instituted by the vendor against the purchaser for recovery of damages on the allegation that the purchaser had broken the contract by not taking delivery of the goods sold. The purchaser brought another suit against the vendor for the return of the deposit he had made with the vendor in respect of the same contract on the allegation that the vendor had broken the contract by not delivering the goods. The two suits were tried together and the vendor's suit was decreed and the purchaser's suit was dismissed on the finding that the breach of contract was on the part of the purchaser. The purchaser filed two appeals against the decrees in the two suits Subsequent to the filing of the appeals, the purchaser became insolvent The Official Receiver wanted to come on the record as appellant and prosecute the appeals

Held, (1) The Official Receiver could not prosecute the appeal filed against the decree awarding damages to the vendor in the vendor's suit, but the proper

*Appeals Nos. 220 and 221 of 1921. 12th August, 1926.

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remedy for him was to contest the validity of the decree in proper proceedings under the Provincial Insolvency Act, as the Insolvency Court is not bound by the decrees passed against the insolvent but can go into the validity of those decrees.

The words "relating to the property of the insolvent" in S. 59 (d) of the Provincial Insolvency Act cannot be taken to mean "affecting the property of the insolvent," as such a construction would give the Official Receiver power to conduct suits of a purely personal nature, and consequently the section cannot be construed so as to authorise the Official Receiver to prosecute the above appeal.

The definition of a debt under the Provincial Insolvency Act includes a decree debt because S. 2 (a) states that 'creditor' includes a decree-holder and 'debtor' includes a judgment-debtor.

(2) The Official Receiver could prosecute the appeal filed against the decree dismissing the purchaser's suit for recovery of the deposit amount, as this amount was the insolvent's *property* and consequently vested in the Official Receiver under S. 28.

In all cases of deposits on contracts, a person in default cannot claim a return of the deposit.

Appeals against the decrees of the Court of the 2nd Additional Subordinate Judge of Madura in O. S. No. 27 of 1921 (O. S. No. 53 of 1920, Subordinate Judge's Court, Madura) and O. S. No. 58 of 1921 (O. S. No. 218 of 1919, Subordinate Judge's Court, Madura) respectively.

C. V. Anantakrishna Aiyar and *P. V. Krishnaswami Aiyar* for appellants.

A. Krishnaswami Aiyar for respondents.

The Court delivered the following

JUDGMENT:—These appeals arise out of a contract for purchase and delivery of goods entered into by the appellant in each of the cases with the respondent. The contract has been filed as Ex. D, which, after describing the goods and the place where the goods were to be got from and delivered in paragraphs 1 and 2, goes on to say that the purchaser shall be bound by the contract he (respondent) entered into with his vendors and should take delivery of the goods. As regards the delivery of the goods and the advance, paragraphs 5, 6 and 7 are material. They run as follows:—

"On the very day on which the aforesaid two persons (their vendors) inform that the aforesaid bales have arrived here you should pay money and take delivery of the bales. Whenever the afore-specified bales are issued from the Mill you should take delivery of the same. We are not liable therefor. As the afore-specified advance money is with us without interest, as the bales are issued, according to the proportion of the advance, you should deduct for the bales at the rate of Rs. 190 and at the rate of Rs. 160 per bale."

Then cl. 8 says:—

"If the bales are received from the aforesaid two persons and if we have not informed you of the same we are liable for the matters of loss that may result therein. In the matter of your not taking delivery after we informed you of the receipt, you yourself are liable for the loss that may arise therein."

This is signed by the respondent firm and is addressed to the appellant firm. Suit No. 27 of 1921 which led to appeal No. 220 of 1921 was filed by the present respondent against the appellant for recovery of damages for breach of contract, the allegation being that the appellant has not performed his contract in taking delivery. The particulars are given in the plaint and the claim, after credit is given for the advance, is for Rs. 8,860 as detailed in Sch. A or in the alternative for Rs. 3,460 as detailed in Sch. B with interest and costs. Suit No. 58 of 1921 which refers to Appeal No. 221 of 1921 was filed by the present appellant against the respondent for the recovery of the advance paid with interest. His case is that under this contract he paid advances, that the respondent did not deliver the goods and therefore the contract was broken by the respondent and that the appellant is entitled to recover the advance with interest. He claims Rs. 5,289-10-0. The suits were tried together and the Subordinate Judge decreed the plaintiff's claim in O. S. No. 27 of 1921, holding that the breach was on the part of the defendant in that suit and awarded a decree for about Rs. 7,000 odd as damages after giving credit for the advance which was paid. He dismissed Suit No. 58 of 1921, the suit filed by the present appellant against the respondent, on the ground that the breach of contract being on the part of the plaintiff in that suit, he was not entitled to recover the deposit.

These appeals are filed by the appellant against the two decrees. After the filing of the appeals, the appellant became insolvent. He applied for the benefit of the provisions of the Provincial Insolvency Act and an Official Receiver was appointed. When the appeals came on, the appellant who became insolvent did not press the appeal. The Official Receiver not being a party did not appear and the result was that the appeals were dismissed. The Official Receiver then applied to be made a party to the appeals on the ground that he had no notice of the appeals and their pendency and that there was a good case to represent to the Court against the decrees of the Subordinate Judge. His petition was granted on terms that he gave security and the dismissal was set aside,

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and he now appears by Mr. Anantakrishna Aiyar to prosecute the appeals.

A preliminary objection was taken by Mr. Krishnaswami Aiyar on the ground that under the Provincial Insolvency Act it is not competent to the Official Receiver to prosecute an appeal which relates to a claim for damages only and does not affect any property of the insolvent. He bases his contention on two grounds. First of all, he states that so far as the claim for damages is concerned, S. 28 of the Provincial Insolvency Act of 1920 states the effect of an order of adjudication. Cl. 2 states that on the making of an order of adjudication, the whole of the property of the insolvent shall vest in the Court or in a Receiver as hereinafter provided, and shall become divisible among the creditors and thereafter, except as provided by this Act, no creditor to whom the insolvent is indebted in respect of any debt provable under this Act shall, during the pendency of the insolvency proceedings, have any remedy against the property of the insolvent in respect of the debt, or commence any suit or other legal proceeding except with the leave of the Court and on such terms as the Court may impose. Then follow what properties, for the purposes of the section, shall be included and excluded. As regards exclusion, cl. 5 of the section says:—

"The property of the insolvent for the purposes of this section shall not include any property (not being books of account) which is exempted by the Code of Civil Procedure, 1908, or by any other enactment for the time being in force from liability to attachment and sale in execution of a decree."

We have now therefore to turn to the Civil Procedure Code to see what are exempted from attachment because such exempted property could not vest in the Court or in the Receiver. Section 60 of the Code in treating of property not liable to attachment refers in cl. (*e*) to a mere right to sue for damages. We take it by mere "Right to sue" is meant a right which has not ripened into or merged in a decree of Court and which still exists as a cause of action which the insolvent can enforce, if he chooses, by filing a proper suit. Section 6 (*e*) of the Transfer of Property Act is also relied upon which exempts from transfer a mere right of suit and states that it cannot be transferred. In the case of an unliquidated claim for damages there can be no doubt that it is a mere right of suit and the contention of Mr. Krishnaswami Aiyar is that reading these sections together in this case, the right of suit would not vest in the Official Receiver and secondly, that he has no right to come in as a party. If the matter rested here,

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there may be some force in this contention. But in this case there are two points to be considered. On the date when the appellants became insolvent not only had the respondent exercised his right of filing a suit but there was also a decree which he obtained against the insolvent and the matter did not rest merely on chose in action which has not ripened into a decree. The case must therefore be judged with reference to S. 59 of the Provincial Insolvency Act. That section says :—

"Subject to the provisions of this Act, the Receiver shall, with all convenient speed, realise the property of the debtor and distribute dividends among the creditors entitled thereto, and for that purpose may (*a*) sell all or any part of the property of the insolvent; (*b*) give receipts for any money received by him, and may, by leave of the Court, do all or any of the following things, namely, (*c*) carry on the business of the insolvent so far as may be necessary for the beneficial winding up of the same; (*d*) institute, defend or continue any suit or other legal proceeding relating to the property of the insolvent"

Then other clauses follow which it is not necessary for us to consider. Turning to this section, what we have to see is what under cl. (*d*) is the meaning of the term "Relating to the property of the insolvent". Is it a suit which directly or immediately affects the property of the insolvent, or is it a suit or legal proceeding which might ultimately result in a decree which, if executed or sought to be enforced, would be payable out of the assets of the insolvent and thereby affect the property ? The argument of Mr. Krishnaswami Aiyar is that it should be such as directly and immediately affects the property and that we cannot hold " relating to the insolvent's property " to mean " affecting the property " because that construction would result in every cause of action which the insolvent had, being continued or defended by the Official Receiver for the benefit of the insolvent, while the law clearly is that so far as regards merely personal actions the Receiver cannot continue them but he can continue actions which are not personal, and he referred to some English cases on the point. We do not think there is very much use in referring to English Law on the subject because the Provincial Insolvency Act has codified and crystallised the law which we have to administer on the subject and we have not been referred to any corresponding section in the English Act. We do not think there is any authority for holding that the words " relating to " must be taken to mean " affecting ". Mr. Ananthakrishna Aiyar himself admits that such a construction, which would give the Official Receiver power to conduct suits of a purely personal nature, which no Court has yet allowed to be done, would be

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placing an undue stretch on the section. What he argues is that where once a decree is passed or where the cause of action does not relate to personal actions but relates to actions founded on contracts and not of a purely personal nature, as the effect of a decree passed would be, if improper, to reduce the assets which are divisible among creditors, or, as the effect of a suit dismissed, if proper, should be to diminish the amount coming into the hands for distribution to the creditors, a wide construction should be placed on S. 59 (*d*). It is argued that the Official Receiver has no remedy in such cases unless a liberal construction is put on S. 59. It seems to us that the Official Receiver has in such cases a remedy. The definition of a debt under the Insolvency Act includes a decree debt because S. 2 (*a*) states that " creditor " includes a decree-holder and " debtor " includes a judgment-debtor. Now the section as regards proof of debt is S. 33 which states that—

"When an order of adjudication has been made under this Act, all persons alleging themselves to be creditors of the insolvent in respect of debts provable under this Act shall tender proof of their respective debts by producing evidence of the amount and particulars thereof; and the Court shall, by order, determine the persons who have proved themselves to be creditors of the insolvent in respect of such debts, and the amount of such debts, respectively, and shall frame a schedule of such persons and debts: Provided that, if, in the opinion of the Court, the value of any debt is incapable of being fairly estimated, the Court may make an order to that effect, and thereupon the debt shall not be included in the schedule. A copy of every such schedule shall be posted in the Court-house."

Then there is the provision that—

"Any creditor of the insolvent may, at any time before the discharge of the insolvent, tender proof of his debt and apply to the Court for an order directing his name to be entered in the schedule as a creditor in respect of any debt provable under this Act, and not entered in the schedule, and the Court, after causing notice to be served on the insolvent and the other creditors who have proved their debts, and hearing their objections (if any) shall comply with or reject the application."

Then comes S. 49 which describes the mode of proof and it says that—

"A debt may be proved under this Act by delivering; or sending by post in a registered letter, to the Court an affidavit verifying the debt. The affidavit shall contain or refer to a statement of account showing the particulars of the debt; and shall specify the vouchers (if any) by which the same can be substantiated. The Court may at any time call for the production of the vouchers."

Then S. 50 says :—

"Where the Receiver thinks that a debt has been improperly entered in the schedule; the Court may, on the application of the Receiver and after notice to the creditor, and such inquiry (if any) as the Court thinks necessary, expunge such entry or reduce the amount of the debt."

Clause (2) deals with cases where no Receiver is appointed. Thus we find that where a decree is passed without the Receiver being made a party, it is open to him to contest the validity of that decree in proper proceedings under the Insolvency Act. So far as the law in England is concerned, it is clear that the Bankruptcy Court is not bound by the decrees passed against the insolvent but can go into proof of the consideration and the amount which is due and the validity of those decrees. We may refer to Williams on Bankruptcy, 13th Edn., page 258. It is therefore not a case where the Official Receiver is without a remedy. We are of opinion that S. 59 does not authorise the Official Receiver to appeal against a decree which was passed against him in a suit for damages which the respondent filed against him. The suit which the insolvent-appellant filed against the respondent for the return of the deposit stands in an entirely different position. His case is that he deposited a certain sum of money with the respondent which was to be appropriated in a certain manner and when certain contingencies happened, that the respondent is not entitled to retain the money as he has not given the goods which was the consideration for the deposit being given and that therefore he is entitled to the return of the deposit. Now, deposit under those circumstances is the insolvent's property. The money is with the respondent but it is the insolvent's property and he is entitled to get a return of the money in certain contingencies. It cannot be said that because the respondent in that suit might justify the retention on the ground that the insolvent has not fulfilled the conditions which would entitle him to its return on a breach of contract, the suit is a suit for damages sounding entirely in damages without any reference to the property of the insolvent. None of these sections would apply because if it is property of the insolvent, and the suit is only for the return of that property, it clearly vests in the Official Receiver under S. 28 and he is entitled to get back the money. The defence which the defendant may raise is no criterion in estimating or appreciating the cause of action of the plaintiff. What we have to see is whether that money can be said to be his property and there can be little doubt that the money would be his property unless the defendant can show a right to appropriation and not to return it. We are of opinion therefore that Appeal No. 220 of 1921 fails and is dismissed with costs as the Official Receiver could not prosecute it and that Appeal No. 221 of 1921 is competent and that the Official Receiver can appeal against

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that decree in so far as it relates to the dismissal of the suit to recover the deposit. In this view the question is material as to whether this deposit which was admittedly received by the respondent in this case is returnable or not ; and that question will turn upon who committed the breach of the contract. In all cases of deposits on contracts it is well established that a person in default cannot claim a return of the deposit and in this case, as it is not denied that if the contract was broken damages would be much more than the amount deposited, no obligations arise to return the deposit for which credit will be given as in estimating the amount of damages. In fact, in the other suit in which a decree was obtained damages were awarded to the extent of Rs. 7,000 after giving credit to the advance. The findings of the Subordinate Judge are these, that as regards two bales, notice was given as required by the contract and the bales were accepted, but as regards one bale, notice was given as required by the contract, but the goods were not taken delivery of and money paid. As regards seven bales, although the respondent said that he tendered seven bales orally, the Subordinate Judge was not disposed to accept the evidence and to find that the seven bales were tendered according to the contract. As regards the 20 bales, the position is that the respondent gave a notice Ex. G to the insolvent stating that these bales were ready and he could take delivery on payment acting on the notice which he got in turn from Ramachari who was bound to deliver the goods. The notice went on to state that as the market was falling and as the traders were being put to great loss the Madura Mills, who were to deliver the goods, were willing to give goods of a more saleable quality in exchange for No. 44 and that it was open to the insolvent-appellant if he chose to accept them in lieu of the goods contracted for under the contract. There is nothing conditional about this notice. There is first of all the statement that the goods were ready for delivery and he could pay and receive them. There is an option given which if he chose he could exercise. It is not disputed that the insolvent-appellant got this notice. Having got it, he did not send any reply. It was his duty under the contract when he got this notice to have immediately paid the money and taken delivery of the goods. If delivery was not to be had at his godown according to the contract and he had to go to his vendor to take delivery, the vendor is not bound to get the goods to his godown in anticipation ; immediately on his coming he could send for the goods and the per-

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formance would be complete. We find here as regards the one bale the insolvent-appellant has admittedly broken the contract ; there is no question about it. In estimating who broke the contract and the effect of this notice, we have to take into consideration not only the fact that the appellant did not reply to this notice as a businessman would be bound to, but that he did not take the one bale regarding which he broke the contract already. The motive for not taking delivery is the falling market. On these facts we think the respondent was justified in assuming that he would not perform the contract by taking the 20 bales and therefore making his own arrangements as regards these bales. As regards the seven bales the position is this : The Judge finds that there was no tender of the seven bales. Even assuming that that finding is correct, the insolvent-appellant who sues for the return of the deposit has broken the major part of the contract and the point is whether we should in this case apportion the damages as regards the seven bales which the Judge finds were not delivered. The contract is a single one and it is not argued before us that having regard to the state of the market, which it is not denied was a falling one about the time of the performance of this contract, the deposit would, if apportioned to 21 bales, still leave a margin as regards the seven bales. In these circumstances no purpose will be served by entering into an enquiry as to what was attributable to seven bales assuming that these seven bales were not tendered. It is clear from the evidence that so far as damages are concerned, it far exceeds the deposit and the suit will therefore fail as the appellant who claimed deposit committed breach of a very large portion of the contract. The appeal therefore fails and is dismissed with costs. The memorandum of objections is not pressed. Dismissed. No costs.

N. S. ——— *Appeals dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

(ORDINARY ORIGINAL CIVIL JURISDICTION.)

PRESENT :—MR. JUSTICE KUMARASWAMI SASTRI.

Narayana Sah ... *Plaintiff**

v.

Sankara Sah and others ... *Defendants.*

Narayana Sah v. Sankara Sah.

Hindu Law—Joint family—Partition—Branches of family—Partition and allotment of share to a member of one of—Effect—Partition subsequent between different branches—Shares of branches at—Manager—Starting of new business by—Power of—Liability of other members for losses of—New business—What

*C S No. 170 of 1923. 12th January, 1926.

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amounts to starting of—Partition suit—Mesne profits—Date from which, awarded.

Where there is a joint family consisting of more branches than one and a member of one of the branches separates himself and is given his share that share would be taken into account on a partition between the other branches.

In the case of a joint Hindu family it is not open to a member to carry on a new venture so as to make his co-parceners liable for any loss in that venture.

Where a family lives by entering into contracts and making profits therefrom, it cannot be said that because a contract entered into at one stage is a new venture in the sense that such a contract was not taken up before, it makes the contract a new venture in the sense that the other members are not liable.

In a suit for partition, *held,* that the 10th defendant, one of the members who claimed partition, was entitled to mesne profits only from the date of his notice calling upon the 1st defendant, the manager, to effect a partition.

P. V. Sudarsana Raju and *N. Rajagopalan* for plaintiff.

T. L. Venkatarama Aiyar for defendants 1 to 9 and 12 to 16.

K. Rajah Aiyar for 10th and 11th defendants.

The Court delivered the following

JUDGMENT :—This is a suit by the plaintiff for a partition of joint family properties, and for the delivery of his share. One Munuswami Sah, Sankar Sah (1st defendant), Chinnaswami Sah and Ponnuswami Sah were four brothers. The 1st defendant is one of the above four who is alive. Munuswami Sah had three sons and a daughter. The eldest son Sudarsana Sah filed C. S. No. 63 of 1910, got his share and got himself divided from the family. The decree in that suit is marked as Ex. A. The second son Chender Sah is the 10th defendant. He has a son and two daughters who are respectively the 11th, 20th and 21st defendants. The third son Narayana Sah is the plaintiff in this suit and the daughter Lakshmi Bai is the 17th defendant. Sankar Sah, the 1st defendant, has five sons and two daughters. Krishna Sah, the eldest son, is the 2nd defendant and he has a minor daughter who is the 18th defendant. The second son Kasi Sah is dead and the 6th defendant is his minor son. The third son Gajapathi Sah is the 3rd defendant and he has a son who is the 7th defendant and a daughter who is the 19th defendant. The fourth son Girdraj Sah is the 4th defendant. The fifth son Rajaram Sah is the 5th defendant. The two daughters are the 15th and 16th defendants. Chinnaswami Sah, a brother of the 1st defendant, is the 8th defendant and his son is the 9th defendant. Ponnuswami Sah, the last brother, died, leaving two sons Krishna Sah and Ramakrishna Sah

For the better understanding of the case the following is the genealogical table:—

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A. Narayana Sah
and
A. Parvathi Bai, 14th defendant.

- A. Munuswami Sah (dead)
  - A. M. Sudarsana Sah (divided)
  - A.M. Chender Sah (10th deft.)
    - A. C. Tukur Sah (11th deft.) (a minor)
    - A. C. Rukmani Bai (20th deft.) (minor)
    - A. C. Kamatchi Bai (21st deft.) (minor)
  - A.M. Narayana Sah (plaintiff)
  - A.M. Lakshmi Bai (17th deft.)
- A. Sankar Sah (1st defendant)
  - A. S. Krishna Sah 2nd deft.
    - A. K. Lakshmi Bai 18th deft. (minor)
  - A. S. Kasi Sah (dead)
    - A. K. Narayana Sah 6th deft. (minor)
  - A. S. Gajapathi Sah 3rd deft.
    - A. G. Kuppa Sah 7th deft. (minor)
    - A. G. Muniamma Bai 19th deft. (minor)
  - A. S. Gidraj Sah 4th deft. (a minor)
  - A. S. Rajaram Sah 5th deft. (a minor)
  - A. S. Nagamma Bai 15th deft. (a minor)
  - A. S. Sadhar Bai 16th deft. (a minor)
- A. Chinnaswami Sah (8th defendant)
  - A.C. Subramania Sah (9th defendant)
- A. Poonuswami Sah (dead)
  - A. P. Krishna Sah (12th deft) (a minor)
  - A.P. Ramakrishna Sah (13th deft.) (a minor)

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who are the 12th and 13th defendants. Thus there were four branches of the family and the relationship is not disputed, nor is it disputed that there are joint family properties in respect of which a partition is necessary. The plaintiff alleges that he is entitled to one-eighth share in the properties whereas the contesting defendants in the suit, namely, the other two branches of the family and their descendants, state that the plaintiff is only entitled to one-twelfth share as Sudarsana Sah whom I have already referred to got his one-twelfth share and became divided from the family and that it should be taken into account in this partition.

One of the questions to be decided is what is the share of the plaintiff and incidentally also what is the share of the 10th defendant who supports the plaintiff. Another question raised in the suit is whether the contract business carried on by the 1st defendant with the Corporation of Madras is joint family business or the separate business of the 1st defendant. The case for the plaintiff and the 10th defendant is that it is the separate business of the 1st defendant while the case of the other defendants is that it is joint family business which the 1st defendant carried on as the head and managing member of the family. There are allegations made in the plaint of waste and mismanagement, but it is unnecessary to consider those allegations as no evidence was let in nor were any arguments addressed on the point as to how far the 1st defendant is liable for any waste or mismanagement. The next question is as regards the rights of the plaintiff and the 10th defendant to mesne profits. Notice was given in the year 1922 by the 10th defendant claiming a share and he would *prima facie* be entitled to mesne profits from the date of notice, but he claims mesne profits two years earlier on the ground that he was making oral demands for partition which were not complied with.

Three questions arise for determination in this suit, *viz.*: (1) What is the share which the plaintiff is entitled to? (2) Whether the contract business carried on by the 1st defendant with the Corporation of Madras is joint family business or the separate business of the 1st defendant in which the plaintiff and the 10th defendant have no interest and are not liable for any loss? and (3) Whether the 10th defendant is entitled to mesne profits for any period earlier than the date of his notice, *viz.*, 7th November, 1922?

As regards the shares to which the parties are entitled the 1st question is whether where there is a joint family consisting of

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more branches than one and a member of one of the branches separates himself and is given his share that share should be taken into account on a partition between the other branches. This question has been considered and decided by the Madras High Court in *Manjanatha* v. *Narayana* (1) where Innes and Muthuswami Aiyar, JJ. held that where a joint family in an advanced state of development is broken up by partition, regard must be had to the successive vested interests of each branch, and in order to secure equality of shares, division *per stirpes* at each stage when a new branch intervenes is necessary. Muthuswami Aiyar, J. puts the question to be decided as follows :—

"The question therefore arising for determination is whether in cases in which some members of a joint Hindu family separate from it at one time and the others on a subsequent occasion, regard should be had to the share allotted at the first partition in computing the shares to be allotted at the second division,"

and both the learned Judges held in an elaborate judgment that where there are different branches entitled to shares and there has been a partition in which a member of one branch has received his share the remaining members cannot claim their shares ignoring the share already given to the member who has separated himself and claim equality as regards partition of the other branches. This decision so far as the Madras High Court is concerned has not been dissented from and seems to me to be equitable. As is pointed out in that case, if there are two brothers one of whom has five sons and the other only one son, and if out of the five sons, four sons get their share and separate themselves from the joint family, it will be inequitable to divide the remaining property equally between the two branches, namely, the undivided son of the first branch and the one son of the second branch ignoring the fact that the other four brothers of the first branch had received their shares and separated themselves from the joint family. It is a recognised principle of Hindu Law that in the case of a joint family consisting of more branches than one the principle of survivorship and the principle of representation in each branch cannot affect the rights of the other branches and that it is only in the case of one branch being entirely extinct the other branches get any advantage by survivorship. It therefore stands to reason that where there is a partition effected between the members of one branch and one of such member goes out, it ought not to affect the vested rights of the other members to their shares in the joint family

1 (1882) I L R 5 M 362.

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property ; and to give effect to the contention of the plaintiff in this case, namely, that the separation of Sudarsana Sah of the first branch from the joint family makes no difference so far as the shares of the other members are concerned would be virtually to deprive the other members of the joint family of their vested rights to their specific shares, because of something which affects the members of the other branch. I am unable to agree with the view taken in *Pranjivandas Shivlal* v. *Ichharam* (2) as I think that the view taken in that case would really work hardship on the other branches of the joint family. It has now been settled that a member of a Joint family may separate leaving the other members as joint and though in the case of a joint family which consists only of sons of one father there may be no difficulty, the hardship pointed out in *Manjanatha* v. *Narayana* (1) as regards cases where the family is in an advanced state of development and where there are several members is, I think, real. I do not see sufficient grounds for not following the decision in *Manjanatha* v. *Narayana* (1). I think this is one of the cases where the principle of *per stirpes* should be applied and it will cause a great deal of hardship and confusion if the ruling in *Manjanatha* v. *Narayana* (1), which is, in my view, consonant with equitable principles and which has been treated as good law for several years and partition effected on that footing is not followed.

I am therefore of opinion that the plaintiff and the 10th defendant are each entitled to one-twelfth share.

The next question is as regards contract business carried on by the 1st defendant with the Corporation of Madras. The evidence of the 1st defendant is that the family is a trading family, that both his father and grandfather were engaged in contract work and that in 1910 owing to there being no contracts in hand he entered into the contract with the Corporation. He says that the immediate occasion for entering into this contract with the Corporation was that one Chockalinga Naicker, who owed money to the joint family, had entered into a contract with the Corporation which he was not able to carry out and he suggested that this family may take over this contract and also the materials which he had collected for the purpose of this contract and that he (the 1st defendant) entered into this contract with the Corporation and continued to

1. (1882) I L R 5 M 362. 2. (1915) I L R 39 B 734.

do the work from 1910 to 1922. He says that even now there is some contract with the Corporation. He says that the adult members of the family, defendants 8 and 10, were actually attending to this business, that no objection was taken by any of them till notices passed in 1922 regarding the carrying on of this business. The 10th defendant who is an undivided brother of the plaintiff admits that he was looking after this business from 1910 onwards but states that he did so thinking that it was first defendant's separate business and that he did so at the instance of the 1st defendant who asked him to attend to this business. So far as the 8th defendant is concerned, he in his written statement admits that it is a joint family business and the evidence is that both the 8th and 10th defendants were taking a prominent part in the management of this business. It is not disputed that both the father and the grandfather of the 1st defendant were carrying on contract work. It is admitted that they were carrying on trade in silk thread and Lameta and that they were carrying on contract business with the Army Clothing Department. In the plaint filed by Sudarsana Sah in 1910, he, after referring to the contract with the Army Clothing Department, refers to several other contracts which the parties then took up and I have no doubt that the family was a trading family, one of the important branches of activity being the taking up of contracts. It has no doubt been now settled that in the case of a joint Hindu family it is not open to a member to carry on a new venture so as to make his other co-parceners liable for any loss in that venture. But it can hardly be said on the evidence before me in this case that the contract with the Corporation was a new venture in that sense. No doubt where a family lives by entering into contracts and making profits therefrom it cannot be said that because a contract entered into at one stage is a new venture in the sense that such a contract was not taken up before it makes the contract a new venture in the sense that the other members are not liable. The question often is the difference in degree or the difference in kind, and so long as the business is a business which is similar in nature it cannot be said that the business is a new venture which could not bind the other members of the family. In this case there is the further fact that joint family funds were utilised without any objection for the performance of this contract with the Corporation.

The main ground on which it is sought to prove that this contract is not binding on the plaintiff and the 10th defendant

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is that the 1st defendant when he began this business opened a new account called 'Thundu Kanakku' with the firm of R. M. M. S. T. and that moneys were drawn from that firm for the purpose of this contract business. It is also pointed out that the 1st defendant in the statement of account filed by him in the suit filed by Sudarsana Sah in 1910 says that he is a debtor to the family to the extent of Rs. 9,000 which represents the value of the materials that Chockalinga Naicker gave to the family. It is also pointed out that a separate account was kept as regards this contract business. The 1st defendant says that he kept a separate account because there were partners in this contract business, that originally it was intended to take Chockalinga Naicker as a partner and work this business, but that Chockalinga Naicker not being satisfactory the idea was given up, that subsequently there were two partners Krishnamachari and Subramania Aiyar, that the business was an extensive one with partners and that a separate account was kept. The 1st defendant says that moneys drawn under 'Thundu Kanakku' were utilised for joint family business also and he points out an entry where Rs. 1,000 drawn under the 'Thundu Kanakku' was utilised for Lameta business. He also states that he did not keep the moneys he got from this contract business separate from the other moneys and that all the moneys were indiscriminately utilised for joint family purposes. Having regard to the fact that the adult members of the family were working in this contract business without any objection from 1910 onwards and also having regard to the fact that the family was a trading family, one of the important branches of their activity being contract business, and also having regard to the fact that the 1st defendant was not keeping a separate account of the profits derived from this contract business I do not think I can hold that the contract business entered into by the 1st defendant with the Corporation of Madras was a separate contract entered into by the 1st defendant in which the plaintiff and the 10th defendant had no interest.

The next question is as regards the mesne profits claimed by the 10th defendant. His case is that two years before he gave notice to the 1st defendant and during his absence in Conjeeveram the lock of the room in which the materials of the Army Clothing Department had been kept was broken open by the 1st defendant, that since then there were misunderstandings and that he was living separately although he admits that he was attending to the work. The 1st defendant

denies that there were any misunderstandings in connection with the breaking open of the lock. He states that in that room the surplus stock in respect of the Army Clothing contract was kept which was being damaged by being locked up, that he got a purchaser from Rangoon in respect of the materials that were lying idle there, that as the 10th defendant was absent and as the purchaser was going back to Rangoon he opened the lock and that it did not give rise to any misunderstanding between the parties. The evidence of the 1st defendant is supported by the evidence of Krishna Sah who is a respectable witness and who admittedly was one of the persons who mediated between the 1st and 10th defendants. He states that the 1st defendant was ready to give a share to the 10th defendant, that there was nothing said about any quarrels before 1922 and that there was no complaint of breaking open the lock as giving rise to misunderstandings between the parties. The 10th defendant says that Dr. Venkatasami and one Raghul Sah mediated but they are not called. On the evidence I do not think I can hold that the 10th defendant is entitled to mesne profits for any period prior to the date of his notice in which he called upon the 1st defendant to effect a partition.

There will therefore be a decree declaring that the plaintiff and the 10th defendant are each entitled to one-twelfth share in the joint family properties, that the contract business carried on by the 1st defendant with the Corporation of Madras was a joint family business in which the parties are entitled to profits and liable for losses in proportion to the shares to which they are entitled in the joint family properties, that the 10th defendant is entitled to mesne profits from the date of his notice, viz., 7th November, 1922 and that the plaintiff is entitled to mesne profits from the date of the plaint. It will also be declared that the 1st defendant is not liable for any sum claimed in respect of waste or mismanagement alleged in the plaint. There will be a preliminary decree in the above terms. The suit will be referred to the Official Referee for taking an account of the joint family properties—moveable and immoveable of the debts due to and by the joint family and of the profits and losses in respect of the various contracts now in hand and on such accounts being taken there will be a final decree for partition giving to the plaintiff and the 10th defendant one-twelfth share each. The other defendants do not ask for any share.

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As regards costs the plaintiff and the 10th defendant will be entitled to take their costs incurred up to this date out of the estate and further provision will be made for the costs of the reference when the final decree is passed.

A. S. V. *Preliminary decree for partition.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE ODGERS.

Velayuda Pandaram (died) and others ... *Appellants** (*Plaintiff and his L. Rs.*)

v.

Sundara Balakumaraswami Maniagar and others ... *Respondents (Defendants).*

Velayuda Pandaram v. Sundara Balakumaraswami Maniagar.

Res judicata—*Bar of—Addition of wholly unsustainable claim to enable plaintiff to institute subsequent suit in superior Court and to escape—Permissibility.*

A party whose claim to a charge in respect of an annuity would be clearly *res judicata* cannot escape the bar of *res judicata* by adding in a subsequent suit a wholly unsustainable claim for interest on the annuity so as to enable him to institute that suit in a superior Court.

Second Appeal against the decree of the District Court of Ramnad at Madura in A.S.No.861 of 1918 preferred against the decree of the Court of the Temporary Subordinate Judge of Ramnad at Madura in O.S.No.49 of 1916.

T. R. Ramachandra Aiyar and *S. R. Muthuswami Aiyar* for appellants.

K. Rajah Aiyar and *C. A. Seshagiri Sastri* for respondents.

The Court delivered the following

JUDGMENT :—This was a suit for the recovery of certain moneys with interest at 12 per cent. per annum being arrears of annuity due for faslis 1318 to 1325. The step-brother of the Zamindar of Vadimitta obtained a decree for a half-share in a suit for partition in the Zilla Court of Tinnevelly in 1846. The Zamindar appealed and pending the appeal a compromise, Ex. B, was effected in 1848, the step-brother under it giving up his claim to a share in the zemindari in consideration of an annuity of Rs. 950 per annum to be made a charge on the rents of 8 villages. The step-brother died leaving three sons, Kumara Etta, Venkateswara and Dalavoy. In 1863 the two latter instituted a suit for the division of the annuity mak-

*S A No. 336 of 1920. 14th April, 1925.

Velayuda Pandaram v. Sundara Balakumaraswami Maniagar.

ing their brother Kumara Etta and the Zamindar defendants. This suit was also compromised and the two plaintiffs became entitled to an annuity of Rs. 280 out of Rs. 950. Dalavoy died and his right passed to Venkateswara by survivorship. On 12th February, 1895 Venkateswara hypothecated his right in Rs. 280 to plaintiff under Ex. A. Plaintiff sued on foot of Ex. A (O. S. No. 157 of 1899, Sattur District Munsif's Court) and got a decree, Ex. D. In execution of the decree he brought the right to the annuity to sale and purchased it himself on the 31st March, 1905. The Vadimitta Estate meantime was the subject of litigation among rival claimants. The Collector of Tinnevelly filed an inter-pleader suit (O. S. No. 63 of 1899) to which all the rival claimants were parties. The suit was referred to arbitration and a compromise, Ex. E followed and the 9th defendant in that suit who is the lineal descendant of Kumara Etta, instead of the annuity of Rs. 950, got an one-fourth share in the Vadimitta Estate. He is the 1st defendant in this suit. Under Ex. E Rs. 280 which had to be paid by the present 1st defendant out of Rs. 950 was made a charge on the one-fourth share allotted to the 1st defendant instead of a charge on the 8 villages as in Ex. B and the 1st defendant was made liable to pay this sum. On the foot of Ex. D (1) the plaintiff sued in O. S. No. 533 of 1908 in the Sattur District Munsif's Court for the recovery of the annuity due for three years, faslis 1315 to 1317, claiming a charge in respect of it on the 8 villages. He obtained only a money decree and the High Court held on the construction of Ex. B which is Ex. F (1) in the present suit, that there was only a personal covenant on the part of the obligee to pay the annuity coupled with the special remedy defined in the document. Before the Subordinate Judge it was argued that the plaintiff was entitled to no interest on the annuity, and secondly that his claim for a charge was *res judicata* by reason of the decision of the suit O. S. No. 533 of 1908. The Subordinate Judge held that the claim for interest was wholly untenable and unsustainable and had merely been added in order to enable the plaintiff to institute a suit in the Court of the Subordinate Judge instead of that of the District Munsif where it would have been clearly barred as having been decided in O. S. No. 533 of 1908. The District Judge upheld the point of *res judicata* and also held that though the compromise Ex. E created a charge for Rs. 280 the plaintiff a party to it was not entitled to enforce the covenant in his favour, against the defendant.

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Two points were argued before me in Second Appeal, namely, that the appellant could enforce the charge under Ex. E and secondly that the decision of the Lower Courts as to *res judicata* was wrong. With regard to the second point which I will deal with first, it is said quite rightly that the amount as well as the nature of the suit must be taken into consideration in deciding whether a subsequent suit is barred under S. 11, Civil Procedure Code. The authorities quoted for the appellant are all cases where the subsequent suit in the higher Court was *bona fide* admissible. By that I mean that the claim of the plaintiff had not been wilfully inflated simply in order to give jurisdiction to the superior Court. Here, interest was disallowed in all the Courts below and in the High Court in second appeal was dismissed. It does not appear in so many words from the judgment that the question of interest was argued but it was taken in the grounds of appeal and I must take it that the whole of the plaintiff's claim which included interest as set out in the plaint was found against. The judgment of the High Court in second appeal was delivered on the 15th December, 1915. The plaint in the present suit was presented on 8th April, 1916. It seems to me therefore that the plaintiff must have known that his claim for interest was wholly unsustainable as found by the Lower Courts and that the learned District Judge was right in saying that the plaintiff cannot escape the bar of *res judicata* by merely waiting for 7 years in order to increase his claim to an amount of Rs. 3,000. This point is sufficient to dispose of the second appeal as if interest is disallowed there is no doubt that the present claim is concluded by the judgment in O.S.No.533 of 1908. Reference may be made to the case reported in *Venkatanarasimha Appa Rao* v. *Narasimha Charyalu* (1) where it was held by a Bench of this Court that the plaintiff cannot be allowed to get over the bar of *res judicata* by including in a later suit a clearly untenable claim. The subject-matter of this suit is the same as in the former, namely, the recovery of the annuity of Rs. 280 and interest. It does not, in my opinion, make any difference that the suit in the High Court decided on Ex. F (1) and the present suit is brought in respect of Ex. E. The decision of the learned District Judge was right and the second appeal must be dismissed with costs of 11th and 10th respondents, two sets.

A.S.V. *Second Appeal dismissed.*

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1. (1909) 21 M L J 154.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE CURGENVEN.

Banathoor Nellipatta Krishnan Namboodripad ... *Appellant** (*Plaintiff*)

v.

Chathothparkum Komath Ambu Kurup and others ... *Respts.* (*Defts. Nos.* 1 *to* 3).

Krishnan Namboodripad *v.* Komath Ambu Kurup.

Interest—Mortgagee in possession not paying Government revenue—Mortgagor paying the same—Claim for reimbursement by mortgagor—Interest whether can be awarded—Interest Act (XXXII of 1839)—Provisions of, whether exhaustive.

The mortgagee in possession defaulted in the payment of Government revenue and the mortgagor paid the same. In a suit for redemption of the mortgage the Court disallowed to the plaintiff interest upon the amount paid by him towards the Government revenue on the ground he was not entitled to it under the Interest Act.

Held, that the provisions of the Interest Act are not exhaustive and interest must be awarded as damages, as the defendant has had the benefit of the plaintiff's money and should not be allowed to benefit by his own laches.

Abdul Saffur Rowther v. *Hamida Bivi Ammal*, (1919) I L R 42 M 661: 36 M L J 456 referred to.

Second Appeal against the decree of the Court of the Subordinate Judge of Tellicherry in A. S. No. 27 of 1922 (A. S. No. 251 of 1921 on the file of the District Court of North Malabar) preferred against the decree of the Court of the District Munsif of Payyoli in O.S.No. 53 of 1920.

K. P. Ramakrishna Aiyar for appellant.

K. Subramania Aiyar for respondents.

The Court delivered the following

JUDGMENT :—The plaintiff prefers this Second Appeal against the decree granted to him redeeming the *kanom* in so far as it has disallowed him interest upon the amount of Government revenue which he paid on default of payment by the 1st defendant, the mortgagee. Under the terms of the *marupat* the mortgagee was to pay the annual *pattom* towards the interest on his *othi* amount and towards the assessment. Even if this express provision had not been contained in the mortgage deed, S. 76 (*c*) of the Transfer of Property Act lays down that a mortgagee in possession is bound to pay the Government revenue. The plaintiff's claim to reimbursement accordingly is provided for by S. 69 of the Indian Contract Act and the question is whether such reimbursement may legally include a claim to interest upon the money expended. The learned Subordinate Judge has rejected this claim because

*S A No. 1397 of 1923. 18th August, 1926.

Krishnan Namboodripad v. Komath Ambu Kurup.

it cannot be treated as a debt recoverable by the plaintiff from the defendant and because the plaintiff made no demand. I presume he has in mind the provisions of the Interest Act, but it has been held in *Abdul Saffur Rowther* v. *Hamida Bivi Ammal* (1) that those provisions are not exhaustive.

"On the other hand the Privy Council held very early that, on principles of equity, justice and good conscience which are specially referred to in the Civil Courts Act, the Courts in India are at liberty to award interest in cases not coming within the purview of the Interest Act. The Indian Courts have followed this rule for a long time."

I think it hardly needs pointing out that the 1st defendant in this case has had the benefit of the plaintiff's money and that it would not be in accordance with equity that he should benefit by his own laches, which he would do if the claim for interest were disallowed. My attention has also been drawn to the fact that the Courts in England allow a mortgagee interest in certain cases upon money which he has laid out, for instance, for the benefit of the estate or in support of his security or in redemption of land tax (Fisher's Law of Mortgage, 6th Edition, para. 1812). The converse case of a similar claim by a mortgagor may, I think, be taken to follow.

I consider that interest may be awarded as damages for the amount due in this respect and that the case is one in which it should be granted. The appeal is allowed with costs and the decree of the Lower Appellate Court will be modified by the inclusion of the amount due as interest at six per cent. per annum on the sums paid by the plaintiff in respect of land revenue. The District Munsif will assess this sum and enter it accordingly.

The Appeal Memorandum includes also an objection to the award of full costs to the mortgagee, but it is not pressed.

Time for redemption is extended by three months from the date on which the District Munsif frames the decree as above directed.

N. S. *Appeal allowed and decree of the Lower Court modified.*

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1. (1919) I L R 42 M 661: 36 M L J 456.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE JACKSON.

E. Raman Chettiar ... *Petitioner** (*Accused*)

Raman Chettiar, *In re.*

Penal Code, Ss. 468, 109, 420 *and* 511—*Offences under—Jurisdiction to try—Cheating by causing dispatch of bogus telegrams.*

The petitioner was charged firstly that at Coonoor he induced one *K* to write bogus telegrams, the offence under Ss. 468 and 109, Penal Code, and secondly, that he attempted to cheat one *P* by causing the dispatch of telegrams at Tanjore, the offence under Ss 420 and 511, Penal Code.

The facts on which the charge was based were that the petitioner at Coonoor gave the telegram for dispatch from Tanjore to one *J*.

Held that, as the petitioner caused the dispatch of the telegram at Tanjore, the Tanjore Sub-divisional Magistrate had jurisdiction to try the offences charged.

Petition under Ss. 435 and 439 of the Code of Criminal Procedure, 1898, praying the High Court to revise the order of the Court of the Sub-divisional Magistrate of Tanjore, dated 29th May, 1926, in C. C. No. 30 of 1925 (transferred to the Sub-divisional Magistrate of Kumbakonam and numbered as C.C.No. 2 of 1926).

V. Ramaswami Aiyar for *K. Rajah Aiyar* for petitioner.

The Public Prosecutor on behalf of the Crown.

The Court made the following

ORDER :—Petitioner seeks to cancel the charge framed by the Sub-divisional Magistrate of Tanjore in C.C. No. 2 of 1926 on the ground that the Sub-divisional Magistrate has no territorial jurisdiction to try the offences in the aforesaid charge.

The petitioner is charged firstly that at Coonoor he induced one Krishna Aiyar to write bogus telegrams, the offence under Ss. 468 and 109, Indian Penal Code, and secondly, that he attempted to cheat one Palaniappa Chettiar by causing the dispatch of telegrams at Tanjore, the offence under Ss. 420 and 511, Indian Penal Code.

The facts on which the charge is based are that the petitioner at Coonoor gave the telegram for dispatch from Tanjore to one Jambulingam Asari. The petitioner contends that any attempt to cheat that he may have made was complete when he gave the telegrams to Jambulingam at Coonoor; and he did nothing afterwards in Tanjore which could be held to be an attempt.

The Public Prosecutor in reply argues that the only act which could be described as an attempt was the dispatch of the telegrams, and this petitioner did through his agent Jambu-

*Cr R C No. 152 of 1926
(Cr R P No. 135 of 1926). 24th August, 1926.

Raman Chettiar, *In re.*

lingam. Giving the telegrams to the agent at Coonoor was only preparation. It is very difficult to draw the line between preparation and attempt. *In the matter of the petition of Riasat Ali* (1) the opinions of two very eminent English Judges are cited, and it is not very clear on what grounds Knox, J. brushes them aside in *In the matter of the petition of R. MacCrea* (2) as having no bearing upon the Indian statute. Lord Blackburn says " if the actual transaction has commenced, which would have ended in the crime if not interrupted, there is clearly an attempt to commit the crime. " Cockburn, C. J. says "the word ' attempt ' clearly conveys with it the idea that if the attempt had succeeded the offence charged would have been committed. "

In the matter of the petition of R. MacCrea (2) deals with a case of cheating, and Knox, J., remarks at page 179 that acts are attempts if they are acts committed for the purpose and with the intent to bring preparations to bear upon the mind of the person to be deceived.

It seems clear from these pronouncements that in the offence of cheating the actual transaction must have begun, and an act to bear upon the mind of the victim must have been done before a preparation can be said to be an attempt

In the present case the actual transaction did not begin until the telegrams were dispatched nor until that dispatch was any act done to bear upon the mind of the person deceived.

Neither writing the telegrams nor giving them to a messenger for dispatch can be said to have been the actual transaction in the sense in which Lord Blackburn used "actual transaction" though such a preparation may be part of the same transaction, in the sense in which transaction without the qualifying adjective ' actual ' is used in S. 235, Criminal Procedure Code.

Assuming therefore that the petitioner caused the dispatch of the telegram at Tanjore, the Tanjore Court should have jurisdiction and there is no reason to interfere.

The petition is dismissed.

A. S. V. *Petition dismissed.*

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1. (1881) I L R 7 C 352. 2. (1893) I L R 15 A 173.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE DEVADOSS.

Arjuna Mahapatro and others ... *Appellants** (*Defendants 2 to 4 and L. Rs. of 1st defendant*)

v.

Dayanidhi Bhainipati ... *Respondent* (*Plaintiff*).

Arjuna Mahapatro *v.* Dayanidhi Bhainipati.

Evidence—Documents—Admission by Court below without formal proof—Rejection in appeal for want of proper proof—Permissibility—Court of Wards Act—Survey under—Document prepared by surveyor in course of—Admissibility against persons not parties to proceeding—Probative value—Commissioner's report—If evidence in case—Filing of it as an exhibit—Necessity—Finding of fact—Interference with in second appeal.

When documents are admitted in evidence with or without formal proof in the first Court, it is not open to the Appellate Court to reject the documents as not having been properly proved. The case is, however, different if the documents are not relevant documents.

Documents prepared by a surveyor under the authority of the Collector, as agent of the Court of Wards, in the course of a survey under the Court of Wards Act for the purpose of the Court of Wards, are of little or no probative value as against a person who was no party to the proceedings adopted by the Collector, or, under his authority, by his surveyor.

A Commissioner's report is evidence in the case, but Courts should take care to see that it is filed as an exhibit. The party in whose favour the report is must get it filed as an exhibit.

As, in spite of the improper rejection or non-consideration by the Lower Appellate Court of certain pieces of documentary evidence, there was ample evidence to support its finding of fact, which was an affirmance of that of the Court below, the finding of the Lower Appellate Court was not interfered with.

Second Appeal against the decree of the District Court of Ganjam in A. S. No. 204 of 1919 preferred against the decree of the Court of the Temporary Subordinate Judge of Ganjam at Berhampore in O. S. No. 20 of 1917.

C. S. Venkatachariar and *B. Jagannadha Doss* for appellants.

K. Sanjiva Kamath for respondent.

The Court delivered the following

JUDGMENT :—The first point urged in this second appeal is that the learned District Judge erred in rejecting Exs. VI and VI (*a*) as not having been properly proved. They were admitted in evidence in the first Court and the learned Subordinate Judge dealt with them in para. 7 of his judgment. When documents are admitted in evidence with or without formal proof in the first Court, it is not open to the Appellate Court to reject the documents as not having been properly proved, for, in several cases, parties may dispense with formal proof of documents and admit in evidence documents which are rele-

*S A No. 1451 of 1923. 20th July, 1926.

Arjuna Mahapatio v Dayanidhi Bhainipati.

vant. When the trial Court with the consent of the parties admits a document in evidence without formal proof, it is not open to the Appellate Court to reject the document from consideration as not having been properly proved. It is open to the Appellate Court to refuse to consider a document on the ground that it is not a relevant document. But I do not think that the Judge's decision has been vitiated by his rejection of Exs. VI and VI (*a*) from consideration. They are documents to which the plaintiff was not a party. The contention of Mr. Venkatachariar is that they were prepared by a surveyor under the authority of the Collector who was then the agent of the Court of Wards and that at that time there was no reason for the surveyor making a wrong survey and that therefore these documents are strong evidence in support of his case. As observed by the learned Subordinate Judge these documents are of little or no probative value. The mere fact that they were prepared by a public officer is not by itself sufficient to make them very strong piece of evidence against a person who was no party to the proceedings adopted by the Collector or under his authority by his surveyor. It was not a survey under the Madras Survey and Boundaries Act. It was a survey no doubt under the Court of Wards Act for the purpose of the Court of Wards. I do not think that in the circumstances these documents are of any great probative value in a case like this in which the parties to the action were in no way concerned in the proceedings before the surveyor. As there is a volume of evidence upon which the learned District Judge has relied for his conclusion, I do not think that his ruling out Exs. VI and VI (*a*) as not having been proved vitiates his judgment.

The next point urged is that the Lower Courts ought to have considered the Commissioner's report in the case. A Commissioner was appointed at the close of the case and he submitted his report which is printed at pages 3 to 5 of the documents. The Subordinate Judge does not make any reference to it, and the learned District Judge before whom the contention was raised by the appellants as regards the non-consideration of the Commissioner's plan and report by the Lower Court remarked :

"It appears that the plaintiff objected to the report and plan, and as the Commissioner was not examined as a witness, the Subordinate Judge was right in leaving them out of account".

A Commissioner's report is evidence in the case, but Courts should take care to see that the report is filed as an exhibit. No doubt there is the loose practice prevailing in the mofussil of

Arjuna Mahapatro v. Dayanidhi Bhamipati.

reading a Commissioner's report as evidence without marking it as an exhibit, but what appears to have happened in this case was that the plaintiff objected to the correctness of the report and the defendants who were interested in getting it filed as an exhibit did not care to rely on it. They should have asked the Court to have it filed as an exhibit. In order to see whether the appellants have a legitimate ground of complaint I went through the Commissioner's report and I find that as regards two points the Commissioner's report is not of any value to either side and that as regards one point, that is the existence of Bado Ghayi, it is of some value. Evidently considering the non-conclusiveness of the report, both sides seem to have given the go-by to it and it does not lie in the mouth of the appellants to say that the Lower Courts ought to have relied upon the document, when they themselves did not take the trouble to have it marked as an exhibit. If they had asked the Court to have it marked as an exhibit, the Court would have examined the Commissioner and given an opportunity to the plaintiff to substantiate his objections to the plan and report. As there is a considerable value of evidence in the case upon which both the Lower Courts have relied for the conclusion they came to, I do not think that the non-consideration of the Commissioner's report, even if it is treated as evidence without having been formally filed, has in any way affected the result of the case. As the learned District Judge has concurred in the conclusion arrived at by the trial Court and as his findings of fact are supported by evidence on record, I do not think that the contention of the appellant ought to be allowed to prevail.

In the result, the second appeal fails and is dismissed with costs.

A. S. V. *Second Appeal dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE DEVADOSS.

Swaminatha Mudaliar ... *Appellant** (*Plaintiff and Petitioner*)

v.

Ebramsa Rowther and another ... *Respondents in both* (*Defendants Nos.* 1 *and* 2).

Swaminatha Mudaliar v. Ebramsa Rowther.

Second Appeal—Grounds which can be urged at first hearing—Grounds specifically given up at time of admission of appeal—Urging of—Permissibility.

*S. A. No. 1447 of 1925 and C M P No. 1464 of 1926. 22nd July, 1926.

Swaminatha Mudaliar v. Ebramsa Rowther

When a Vakil gives up certain grounds in the Memorandum of Appeal fearing that otherwise his appeal might be dismissed by the Bench before which the appeal comes on for admission and gets that Court's permission to urge fresh grounds, he cannot at the final hearing of the appeal be allowed to urge the grounds specifically given up at the time when the appeal came on for admission.

Second Appeal against the decree of the District Court of West Tanjore at Tanjore in A. S. No. 196 of 1921 preferred against the decree of the Court of the Subordinate Judge of Kumbakonam in O. S. No. 48 of 1918.

E. Vinayaka Rao, N. S. Srinivasa Aiyar and *S. V. Narayana Aiyar* for appellant.

R. Kuppuswami Aiyar and *T. R. Srinivasarajagopala Aiyangar* for respondents.

The Court delivered the following

JUDGMENT :—Mr. Vinayaka Rao wants to argue grounds Nos. 24 and 25 in the Memorandum of Appeal. Mr. Kuppuswami Aiyar for the respondents has brought to my notice the order of the learned Judges passed at the time of admitting the appeal. That order is as follows :—

"Appellant is allowed to add to his grounds of appeal that stated in his C. M. P. filed to-day, this being practically the only ground available in second appeal. Grounds 1 to 25 are struck out with appellant's consent".

Mr. Srinivasa Aiyar who appeared at the time when the case was taken up for admission before Mr. Justice Phillips and Mr. Justice Venkatasubba Rao states that he did not carefully read the grounds and that he thought that there was some other good ground for purposes of admission and that is why he consented to give up grounds 1 to 25. From the records it appears that the learned Judges allowed the appellant to put in fresh grounds as they thought there was nothing in the grounds already filed. Having induced the learned Judges to admit the appeal on grounds which were only put in after having undertaken to give up the grounds already mentioned in the Memorandum of Appeal I do not think it is competent to the appellant to urge on any of the grounds specifically given up. A vakil may no doubt give up a ground and press it at a later stage with the permission of the Court. But when he gives up certain grounds fearing that his appeal might be dismissed by the admission Court and gets the Court's permission to urge fresh grounds I think it is not open to him now before another bench to urge the grounds which he gave up in order that his appeal might be admitted. I think it would not be fair either to the Judges who admitted the appeal or for the Judge or Judges who hear the second appeal after notice to allow the appellant to urge the grounds

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specifically given up at the time when the appeal came on for admission. In this view I do not think that the appellant is entitled to argue grounds Nos. 24 and 25. The additional grounds filed on 2nd November, 1923 are against the facts of the case. The appellant stated that the District Court ought to have granted time for redemption. But as a matter of fact he ought to have known that he got possession on 24th November, 1921 nearly 2 years before he instructed his vakil to file this ground. This ground therefore cannot now be urged. There is no other point in this case and the Second Appeal is dismissed with costs. The C. M. P. No. 1464 of 1926 is also dismissed.

A. S. V. *Both Second Appeal and C. M. P. dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE DEVADOSS.

Balaji Singh ... *Appellant** (*Plaintiff*)

v.

Chakka Gangamma and another ... *Respondents* (*Defts.*).

Balaji Singh v. Gangamma.

Transfer of Property (Amendment) Act (XXVII of 1926), S. 2—Act if retrospective—Rules of interpretation—Marginal note—Title of the Act—Attestation—Acknowledgment of signature by executant—Sufficiency of.

The Transfer of Property (Amendment) Act (XXVII of 1926) was passed in order to declare what the meaning of the word "attested" is, in the Transfer of Property Act, and in no sense alters or amends the law. It is retrospective in its operation and applies to pending actions. Principles of interpretation explained; English case-law referred to.

How far in the case of Indian enactments the marginal notes and the title of an Act can be made use of, to interpret a section or to find out the scope of the Act, considered.

Where the attestors to a mortgage deed deposed in their evidence that the document was brought to them after execution and that they put in their signatures after the executants acknowledged the execution of the document, it is sufficient attestation within the meaning of the Transfer of Property Act.

Second Appeal against the decree of the Court of the Subordinate Judge of Bezwada in A. S. No. 188 of 1922 preferred against the decree of the Court of the District Munsif of Bezwada in O. S. No. 728 of 1921.

P. Satyanarayana Rao for appellant.

V. Suryanarayana for respondents.

The Court delivered the following

JUDGMENT :—The only point in this second appeal is whether the execution of the mortgage deed sued on, Ex. A, has been proved. The District Munsif held that it was validly

*S. A. No. 1777 of 1923. 6th August, 1926.

Balaji Singh v. Gangamma.

executed and decreed the plaintiff's suit. The Subordinate Judge reversed the decree of the District Munsif and dismissed the plaintiff's suit on the ground that its execution was not properly proved. The plaintiff has preferred this second appeal.

The evidence of the two attesting witnesses is to the effect that they did not actually see the executant signing the document. P. W. 2 says:

"I did not see the 2nd defendant sign Ex. A or the 1st defendant put her mark in it. It was written somewhere."

P. W. 3 says:

"I was not present when Ex. A was written. The parties to it came to me and the defendants asked me to attest it saying they executed it."

The judgment of the Subordinate Judge would be correct but for Act XXVII of 1926, for the law was that in order to prove the execution of a document the attesting witness should have actually seen the executant sign or put his mark to the document. Act XXVII of 1926 which received the assent of the Governor-General on the 25th of March, 1926, was passed in order to get rid of the interpretation put upon the word 'attestation' by the Courts.

S. 2 of the Act is as follows:—

"In S. 3 of the Transfer of Property Act, 1882, after the definition of the word 'instrument' the following shall be inserted, namely: 'attested' in relation to an instrument means attested by two or more witnesses each of whom has seen the executant sign or affix his mark to the instrument, or has seen some other person sign the instrument in the presence and by direction of the executant, or has received from the executant a personal acknowledgment of his signature or mark, or of the signature of such other person, and each of whom has signed the instrument in the presence of the executant, but it shall not be necessary that more than one of such witnesses shall have been present at the same time, and no particular form of attestation shall be necessary."

Mr. Satyanarayana for the appellant contends that by virtue of the new Act the acknowledgment by the executant of his signature to the document before the attesting witnesses is sufficient for the proper execution of the document and it is not necessary that they should actually see the executant sign the document. If the attesting witness deposes that the executant acknowledged before him his signature or mark to the document and that he attested the document after receiving such acknowledgment, his evidence is sufficient to prove a valid execution. In this case there is such evidence. The question therefore is whether Act XXVII of 1926 applies to the present case. The contention of Mr. Suryanarayana for the respondents is that Act XXVII of 1926 is an amending Act and therefore it has no retrospective effect and should not be construed so as to affect vested rights and that the 1st defendant has already acquired a benefit by the document not

being validly executed and he should not be deprived of it by a construction of the amending statute which would affect his rights. A number of cases have been relied upon by both the appellant and the respondent. The following principles may be taken as established by the cases:—

1. Legislative enactments have no retrospective effect unless explicitly stated to be so in the enactments themselves.

2. Amending statutes should not be construed as having retrospective effect if they affect vested rights.

3. Statutes which are declaratory or explanatory are to be construed as having retrospective effect as they give an authoritative explanation of the words, phrases or clauses used in a statute, and whenever the statute has to be applied the explanation also should be applied.

4. No recital in a declaratory or amending statute can render void that which has been declared by the Courts to have been done rightly under the law.

5. Statutes which affect a mere procedure are retrospective in their nature.

In *Attorney-General* v. *Theobald* (1) it was held that S. 11 of the Customs and Inland Revenue Act of 1889 was retrospective in effect. S. 11 was enacted in order to explain the expression "voluntary settlement" in S. 38 (*c*) of the Customs and Inland Revenue Act of 1881. Baron Pollock observed at page 559:

"The case of *Attorney-General* v. *Hertford* (2) in the Court of the Exchequer is a strong authority that, if an Act is in its nature a declaratory Act, the argument that it must not be construed so as to take away previous rights is not applicable. The present case is, in my opinion, a stronger one in favour of the Crown. Here the earlier Act of 1881 provides what documents are to be stamped and what property is to be affected, describing it as 'any property passing under any past or future voluntary settlement'. These words 'voluntary settlement' having given rise to doubts, the Legislature in 1889 passed an Act which, in S. 11, sub-S. 1 provides that 'sub-S. 2 of S. 38 of the Act of 1881 is hereby amended as follows." Now; although that section begins by using the words 'is hereby amended,' yet, the material part is that which follows in sub-S 1, 'the description of property marked (*c*) shall be construed as if the expression 'voluntary settlement' included any trust.................. in favour of a volunteer ... . whether such deed or other instrument was made for valuable consideration or not as between the settlor and any other person.' Therefore the earlier Act must be read as having the meaning declared by the later Act. That seems to me to make this case perfectly clear."

In *Attorney-General* v. *Bugett* (3), it was held that an Act of Parliament made to correct an error by omission in a

1. (1890) 24 Q B 557. 2. (1849) 3 Ex 662 at 670.
3. 2 Price 381: 146 Eng Rep 130.

Balaji Singh v. Gangamma.

former statute of the same session, has relation back to the time when the first Act was passed. Even when mistakes in legislative enactments are corrected by a later amending Act, the amending Act should be read as part of the Act which it was intended to correct. Though the Act is not called a declaratory or explanatory Act, if from the words used in the Act the Court can come to the conclusion that it is declaratory or explanatory Act, retrospective effect will be given to such Act. This is clear from *The King* v. *The Inhabitants of Dursley* (4). Lord Tenterden, C. J. observed with regard to the amending statute,

> "I think we must understand the second section to be retrospective, because it would be useless unless it were so. The words that 'payment to the amount of 10 l. shall be deemed sufficient for the purpose of gaining a settlement under the said recited Act' import that, as to the payment of rent, the statute is declaratory. If the words had been 'it is hereby declared that payment, etc., shall be deemed sufficient,' there could have been no doubt that the clause would be retrospective. Here the words are the same in effect."

Mr. Suryanarayana for the respondents strongly urges that the Act is an amending Act and therefore it should not be held to have retrospective effect. No doubt the Act is called the Transfer of Property Amendment Act, and in the preamble it is stated "Whereas it is expedient to explain certain provisions of the Transfer of Property Act." The preamble and the title should be read together. From the whole of the Act it is quite clear that it is an explanatory Act and not an amending Act. He relies very strongly upon the observation of Lord Lindley, M. R. in *Fielding* v. *Morley Corporation* (5) quoted by Craies, in his book on Statute Law at page 176 and contends that the title of the Act should be taken into consideration in considering an Act. The observation is as follows :—

> "I read the title advisedly, because now, and for some years past, the title of an Act of Parliament has been part of the Act In old days it used not to be so, and in the old law books we were told not so to regard it, but now the title is an important part of the Act, and is so treated in both Houses of Parliament."

It is also urged by Mr. Suryanarayana that the marginal note should be considered in considering an Act. The marginal note here is "Amendment of S. 3, Act IV of 1882." Whatever may be the view with regard to certain Acts of Parliament, in the case of Indian enactments the marginal notes are never the subject of discussion and they should not be held to control the clear meaning of the section or to show what the

4. (1832) 3 B & Ad 465: 110 E R 168. 5. (1899) 1 Ch D 1.

section means when the section is not clear. Baggallay, L. J., observed in *Attorney-General* v. *Great Eastern Railway Company* (6) :

"I never knew an amendment set down or discussed upon the marginal note to a clause. The House of Commons never has anything to do with the amendment of the marginal note."

These remarks apply with great force to Indian enactments. The object of the Act as stated in the preamble is to explain certain provisions of the Transfer of Property Act. The Act itself is called " The Transfer of Property (Amendment) Act" because it is not usual to style an Act as a declaratory or explanatory Act. The contention that the title and the marginal note make the Act an amending Act cannot be accepted.

The case of *Harding* v. *Commissioners of Stamps for Queensland* (7) does not help the respondent. In that case it was held that the Amendment Act of 1895, S. 2 was not retrospective in its operation. It was a fiscal enactment. Lord Hobhouse in delivering the judgment of the Privy Council observed:

"The nature of the Act must be determined from its provisions. Now, the Act does not contain any words to show that it purports to construe the Act of 1892, it does purport to amend it; every other of its provisions is in language prospective, and in S. 2 itself the new rule is to take effect 'upon the issue of any grant of probate,' which is not fitting language to apply to estates for which probate has already been granted. In fact, the language of the Act points, as their Lordships think, distinctly to future operations "

Mr. Suryanarayana relies upon *Gardner* v. *Lucas* (8) as supporting his contention. In that case, it was held that under the Statute 1696, c. 15 formalities were necessary for the validity of certain agreements. By the 38th and 39th sections of the Conveyancing (Scotland) Act, 1874, several requirements in the previous statute were dispensed with. It was held that the two sections were not retrospective and could not remedy the defects in a deed executed before 1874 which was void under the Act, 1696, c. 5, Lord O'Hagan observed :

"Unless there is some declared intention of the Legislature—clear and unequivocal—or unless there are some circumstances rendering it inevitable that we should take the other view, we ought to presume that an Act is prospective and is not retrospective."

Lord Blackburn observed at page 603:

"But where the effect would be to alter a transaction already entered into, where it would be to make that valid which was previously invalid—to

6. (1879) 11 Ch 449. 7. (1898) A C 769.
8. (1878) 3 A C 582.

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make an instrument which had no effect at all, and from which the party was at liberty to depart as long as he pleased, binding—I think the *prima facie* construction of the Act is that it is not to be retrospective, and it would require strong reasons to show that is not the case."

In this case there is no question of the invalidity of the document. The document was executed. The only question is what is necessary to prove the execution of the document. It cannot be said that the document is invalid when it was executed. Before the Privy Council declared the law, execution could be proved by examining any of the attesting witnesses; it was not considered necessary that the attesting witness should have been actually present when the executant signed or put his mark to the document. The Act XXVII of 1926 was passed in order to declare what the meaning of the word "attested" is and not to alter the law.

It is next argued that the Act should not be applied to pending actions and reliance is placed upon *Hitchcock* v. *Way* (9). In that case the action was brought against an acceptor of a bill of exchange by a *bona fide* holder before the passing of Statute 5 and 6 W. 4, c. 41. It was held that under the Statute 9 Anne, c. 14, the defendant was entitled to non-suit if he proved the bill to have been given for a gaming consideration. Lord Denman, C. J., observed:

"The plaintiff argued that this enactment could only receive effect at the time of trial, and the Court was bound to act upon it as that period. And many cases were cited in which Acts of Parliament repealing and altering the law had been so construed But they all turned on the peculiar wording of those Acts which appeared to the Court to compel them to give the law an *expost facto* operation. It is enough to say that we find no such words in 5 and 6 W. 4, c. 41 and are of opinion in general that the law as it existed when the action was commenced must decide the rights of the parties in the suit unless the Legislature express a clear intention to vary the relation of litigant parties to each other."

This case has no application to the present case as Act XXVII of 1926 does not alter the law as it stood before it was enacted. It only explains the expression "attested" and that explanation has to be inserted after the word "instrument" in S. 3 of the Transfer of Property Act. When any phrase or word or expression in an enactment is explained by the Legislature, the Act has to be applied with the authoritative explanation, for the very object of the authoritative explanation is to enable the Court to understand the Act in the light of the explanation. It cannot therefore be said that this Act does not apply to pending actions. In Maxwell on the

9. (1837) 6 Ad & Ell 942: 112 E R 360.

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Interpretation of Statutes, at page 394 the law is stated as follows:—

"If a statute is in its nature a declaratory Act, the argument that it must not be construed so as to take away previous rights is not applicable."

The observations of Pollock Baron in *Attorney-General v. Theobald* (1) are pertinent to this case.

"It certainly was considered in many cases that where a person had commenced an action he had a vested right, and that any subsequent statute ought not to be construed as retrospective so as to alter that right. That is not an invariable rule, and it does not apply if the language of the statute is clear and express. This appears from a good many authorities, especially those affecting questions of costs."

I hold as the law stands at present it is sufficient if the attesting witnesses prove that the executant admitted before them his signature to the document and they attested it after getting such admission or acknowledgment.

The next question is whether I should record a finding on the question of fact, or whether I should send it down for a finding to the Lower Appellate Court. Seeing that the evidence is not voluminous and the statements of P. W. 2 and P. W. 3 are clear, I think no useful purpose will be served by sending the case down for a finding on the question whether the document has been validly executed or not. S. 103 of the Code of Civil Procedure is intended to cover cases of this kind. P. W. 2 says:

"The first defendant says that they executed it."

P. W. 3 says:

"The parties to it came to me and the defendants asked me to attest it saying they executed it."

It is urged by Mr. Suryanarayana that the evidence of these witnesses was considered untrue by the first Court and therefore they should not be relied on. Though the witnesses did not depose as expected of them, yet there is no reason to reject their evidence as totally false. Very often attestors are asked by the executants to attest the document after they have signed it. I see no reason to reject their evidence. I therefore find that the document has been proved to have been validly executed.

In the result, the appeal is allowed and the decree of the Subordinate Judge is set aside and the decree of the District Munsif restored with costs throughout.

T. S. V. *Appeal allowed.*

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1. (1890) 24 Q B 557 at 560.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE REILLY.

Siluvaimuthu Mudaliar ... *Petitioner** (*Plaintiff*)

v.

Muhammad Sahul and others ... *Respondents* (*Defendants*).

Siluvaimuthu Mudaliar v. Muhammad Sahul.

Contract Act (IX of 1872), S. 45—Joint promisees—Debt due to—Suit by one of them for his share of the debt—Maintainability.

If a suit is brought to recover a debt due to joint promisees, all of them must be impleaded and the suit must be for the entire debt. They are not entitled to split up their claim and each sue separately for his own share. *Annapurnamma* v. *Akkayya;* (1912) I L R 36 M 544: 24 M L J 333 referred to.

Petition under S. 25 of Act IX of 1887 praying the High Court to revise the decree of the Court of the Subordinate Judge of Tinnevelly, dated 23rd February, 1924 in S. C. S. No. 1675 of 1922.

T. A. Ananta Aiyar for petitioner.

S. Sankara Aiyar for respondents.

The Court delivered the following

JUDGMENT :—The Subordinate Judge has found that the defendants 1 to 3 as a firm owed money to Ramaswami Mudaliar and Mahalinga Mudaliar as a firm. Ramaswami Mudaliar and Mahalinga Mudaliar dissolved their partnership and divided between them the outstanding debt due to them from the firm of defendants 1 to 3. After that Ramaswami Mudaliar assigned his share of the debt to plaintiff. Plaintiff, alleging that the whole debt was Rs. 599-12-0, out of which Ramaswami's share was Rs. 449-12-0, sued to recover the latter amount with interest. He presented his plaint without impleading Mahalinga on 6th October, 1922. More than a year later, Mahalinga having died, meanwhile, he added Mahalinga's representative as defendant 4 on 1st December, 1923. By that date, it is admitted, the claim against the firm of defendants 1 to 3 would have been barred by limitation. The Subordinate Judge holding that Mahalinga or his representative was a necessary party and that therefore the suit was not properly instituted until 1st December, 1923, has found that the suit is barred by limitation. Plaintiff in this petition objects to that finding.

It appears that, when defendant 4 was added as Mahalinga's representative, he stated that Mahalinga's share of the debt, *viz.*, Rs. 150, had been paid to him. It is urged for plaintiff that in those circumstances he was competent to sue

*C R P No. 656 of 1924. 18th August, 1926.

alone for the balance of the debt. The answer to this is that until Mahalinga's representative was brought on record there was no suggestion that the suit was for the whole unpaid balance. Another argument urged for plaintiff by Mr. Ananta Aiyar is that, even if this statement that Mahalinga received payment of his share must be disregarded for the present purpose, under R. 4 of O. 30, Civil Procedure Code, Ramaswami as surviving partner of his firm, and therefore plaintiff as Ramaswami's assignee, could sue alone for the whole debt and, if plaintiff chooses to sue for part of it only, the result is merely that he must be treated under R. 2 of O. 2, Civil Procedure Code, as having relinquished the remainder. In regard to this contention, it must be noticed that Mahalinga did not die until after the period of limitation had expired and that apart from that, plaintiff sued as the assignee of part of the debt, not as representing the firm of Ramaswami and Mahalinga. Mr. Ananta Aiyar further contends that Ramaswami and Mahalinga were entitled to split up their claim and each sue separately for his own share. That is against the principle of S. 45 of the Contract Act. And it may be noticed that even in *Annapurnamma* v. *Akkayya* (1) in which the majority of the Full Bench decided that one joint promisee can by himself give a valid discharge of the entire debt, it appears to have been assumed and was stated explicitly by Sankaran Nair, J., that, if a suit is brought to recover a debt due to joint promisees, all of them must be impleaded and the suit must be for the entire debt. Moreover, when two joint promisees have divided as between themselves their claim to recover the debt due to them jointly, it is obvious that, if the first sues for his share without impleading the second, the debtor cannot be protected from a second suit by the second promisee in which it may be denied that the first promisee is entitled to so much out of the amount of the debt as he has claimed in his suit. In my opinion it is clear that in the present case Mahalinga or his representative was a necessary party to the suit. As the representative was not brought on record until after the period of limitation had expired, the whole suit was barred.

It is unnecessary to discuss the effect of not bringing defendants 2 and 3 on record in time. This petition is dismissed with costs.

N. S. *Petition dismissed.*

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1. (1912) I L R 36 M 544: 24 M L J 333 (F B).

[SPECIAL BENCH.]

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—SIR MURRAY COUTTS TROTTER, *Kt.*, *Chief Justice*, MR. JUSTICE KRISHNAN AND MR. JUSTICE BEASLEY.

In Re Sheik Abdul Kadir Marakayar & Co. ... *Assessee**.

F. B.

Sheik Abdul Kadir Marakayar & Co. *In re*

Indian Income-tax Act of 1922, S. 33—Proceedings under—Law point arising in—Statement of case by Commissioner in case of—High Court's power to direct —Application under S. 45 of Specific Relief Act and S. 66 of Income-tax Act—Delay in making—Refusal of Court to exercise its discretion on ground of.

The High Court has power to order the Commissioner to state a case embodying any point of law that may arise in the course of proceedings under S. 33 of the Indian Income-tax Act of 1922.

The power of the High Court was not meant to be confined to cases under Ss. 31 and 32 of the Act, and is not by implication taken away in the case of orders under S. 33.

The Act has no doubt not set a period of limitation on applications relating to orders passed under S. 33; but the jurisdiction conferred by S. 45 of the Specific Relief Act being discretionary, the Court would, in the case of unreasonable and unexcused delay, refuse to exercise it.

Application under S. 45 of the Specific Relief Act and S. 66 of the Indian Income-tax Act.

K. S. Krishnaswami Aiyangar and *N. Srinivasa Aiyangar* for assessee.

M. Patanjali Sastri for the Commissioner.

The Court delivered the following

JUDGMENT :—By S. 66 (1) of the Indian Income-tax Act, 1922, it is enacted—

"If, in the course of any assessment under this Act...... ....a question of law arises, the Commissioner may, either on his own motion or on reference from any income-tax authority subordinate to him, draw up a statement of the case and refer it with his own opinion thereon to the High Court."

—and by sub-section (2)—

"Within one month of the passing of an order under S. 31 or S. 32, the assessee, in respect of whom the order was passed, may, by application accompanied by a fee of Rs. 100 or such lesser sum as may be prescribed, require the Commissioner to refer to the High Court any question of law arising out of such order, and the Commissioner shall, within one month of the receipt of such application, draw up a statement of the case and refer it with his own opinion thereon to the High Court."

There is a proviso with which we are not concerned enabling the assessee, if the final determination of the Commissioner under S. 33 is favourable to him, to withdraw his application and get a refund of the fees that he paid. By sub-section (3),

"If, on any application being made under sub-section (2), the Commissioner refuses to state the case on the ground that no question of law arises, the

*11th November, 1925.

Sheik Abdul Kadir Marakayar & Co., *In re.*

assessee may apply to the High Court and the High Court, if it is not satisfied of the correctness of the Commissioner's decision, may require the Commissioner to state a case and refer to it and, on receipt of any such requisition, the Commissioner shall state and refer the case accordingly."

It is clear that sub-sections (2) and (3) of S. 66 are in terms limited to orders passed under Ss. 31 and 32. As to orders in review passed by the Commissioner under S. 33 as in the present case there is nothing to operate upon except S. 66 (1) and the assessee has no remedy unless we hold that the Court has power to order the Commissioner to state a case embodying any point of law that may arise in the course of proceedings under S. 33. The Privy Council has held in *Alcock, Ashdown and Co., Ltd.* v. *Chief Revenue Authority of Bombay* (1) that the words of the older Act of 1918 import a mandate to the Commissioner to state a case where a real point of law arises, and has further held that if he improperly declines to do so the Court may compel him under the general powers of the Specific Relief Act. It is conceded by Mr. Patanjali Sastri that sub-sections (2) and (3) of S. 66 of the present Act only apply to orders under Ss. 31 and 32 ; but he asks us to draw the inference that the power of the High Court was meant to be confined to cases under those sections and was by implication taken away in the case of orders under S. 33. The result would be that the Commissioner by calling up the records under S. 33 would be in a position to burke any further enquiry whatever. We do not think that that can have been intended and we accordingly hold that the principle of *Alcock, Ashdown and Co., Ltd.* v. *Chief Revenue Authority of Bombay* (1) must be applied to orders under S. 33. It follows that the statute has set a period of limitation on applications which relate to orders passed under Ss. 31 and 32 and not on those which relate to orders passed under S. 33. The answer appears to be that the jurisdiction conferred by S. 45 of the Specific Relief Act is discretionary and that in the case of unreasonable and unexcused delay the Court would refuse to exercise it.

The Court therefore directs the Commissioner to state a case it not being seriously contended that there is not a substantial point of law involved. Costs of this application reserved.

A.S.V. *Commissioner directed to state a case.*

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1. (1923) I L R 47 B 742: 45 M L J 592 (P C).

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE SPENCER AND MR. JUSTICE RAMESAM.

Ry. Pratapa Simha Raja Saheb ... *Appellant** (*Plaintiff*)

v.

Ry. Simji Raja Saheb ... *Respondent* (*Defendant*).

Pratapa Simha Raja Saheb *v.* Simji Raja Saheb.

Res judicata *between co-defendants—Condition—No adjudication between their rights* inter se—*Agreement entered into under mutual mistake of rights—Binding character of*—Bona fide *settlement of disputed claim—Evidence—Religious institution—Scheme of—Alteration of by parties—Usage of institution—Alteration by custom—Trust in existence—Devolution of—Alteration by will—Widow's power of—Limitation Act, Art. 47—Applicability—Hindu Law—Adopted son—Divesting of widow's estate by—Applicability of rule of—Trust property granted by Government for management as head of family.*

In a suit brought by certain third parties against the plaintiff and the defendant, the Subordinate Judge, who dismissed the suit, observed in his judgment, that the defendant was entitled to be the sole trustee of certain Devasthanams and as such to the management thereof and the properties belonging thereto. The third parties preferred an appeal against the Sub-Judge's decree, and the plaintiff put in a memorandum of objections to that appeal in which he urged that the Lower Court was wrong in holding that the defendant was the sole trustee of the Devasthanams and in adjudicating between the claims of the plaintiff and the defendant *inter se*. The High Court dismissed the appeal, observing that sole trusteeship was one of the incidents of the trust. The Memorandum of Objections of the plaintiff was also dismissed.

In a suit instituted by the plaintiff subsequent to the decision of the Sub-Judge in the prior suit for a declaration that he and the defendant were jointly entitled to the management of the Devasthanams and the properties belonging thereto, *held*, that the question of the character of the trusteeship was not *res judicata* because in the former suit there was no adjudication upon the claims of the plaintiff and defendant *inter se*.

Where parties enter into an agreement under a mutual mistake as to what their rights are, they will not be bound by the agreement.

Held, that an agreement between two brothers as to the right to manage certain Devasthanams and the properties belonging thereto was not a *bona fide* settlement of a disputed claim.

Parties have no power to alter the scheme of a religious institution at their own will and pleasure as if they were settling some private right.

The Hindu Law of divestment of a widow's estate by an adopted son applies only to the property which she inherits from her husband. It has no application to trust property which Government gives back to the widow by a grant in order that she should manage it as head of the family for the time being.

There can be no *stridhanam* right in trust property.

The usage of a religious institution cannot be altered by mere custom for one or two generations.

A Hindu widow has no power to alter by will the natural course of devolution of a trust already in existence.

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*Appeal No. 36 of 1924. 5th May, 1926.

Pratapa Simha Raja Saheb v Simji Raja Saheb.

Where a Magistrate's orders confirms the possession of two persons, there is no necessity arising out of that order for either of the two successful parties to bring a suit to declare which of the two is entitled to a separate right of possession. Art. 47 of the Limitation Act is inapplicable to such a suit by either of the two.

Appeal against the decree of the Court of the Subordinate Judge of Tanjore in O. S. No. 81 of 1919.

S. Srinivasa Aiyangar, R. Kuppuswami Aiyar and *S. V. Narayana Aiyar* for appellant.

A. V. Viswanatha Sastri for respondent.

The Court delivered the following

Spencer J.

JUDGMENTS :—*Spencer, J.* :—Sivaji, the last Rajah of Tanjore, died in 1855 leaving 16 Ranees, two legitimate daughters, a mother, 40 sword wives and 17 children by these sword wives, six of them being males. On the death of Sivaji, the Government took possession of all his properties. The estate was restored to the senior surviving Ranee on the 21st August, 1862. On the 19th of March, 1863, the Government made over the Devasthanams to the senior widow in proceedings exhibited as Ex. I in these words :—

"It is desirable that the connection of Government with the pagodas should cease, and they will accordingly be made over to Her Highness Kamakshi Bai Saheba "

On the death of Kamakshi Bai Saheba, the Government again took possession of the Devasthanams and put them in charge of the Devasthanam Committee of the Tanjore District. Upon this, Umamba Bai Saheba, who was then the senior surviving widow, brought a suit which ended in her favour. The judgment of the High Court in appeal is reported in *Kalianasundaram Aiyar* v. *Umamba Bayi Saheb* (1). Justice Shephard, who wrote the leading judgment, came to the conclusion that it was the intention of Government to grant a widow's estate, *i. e.*, to put Kamakshi Bai Saheba in the possession which she would have enjoyed had there been no confiscation on the death of her husband, the Rajah. The last surviving widow of the late Rajah died on 3rd May, 1912. After this, the Receiver of the estate in 1912 filed an interpleader suit to decide who was entitled to take the estate. That suit was numbered O. S. No. 26 of 1912 in the Court of the Subordinate Judge of Tanjore, and the judgments in appeal of Kumaraswami Sastri, J. and myself have been reported in *Maharajah of Kolhapur* v. *Sundaram Aiyar* (2). In 1913

1. (1897) I L R 20 M 421: 7 M L J 324.
2. (1924) I L R 48 M 1 at 229.

Pratapa Simba Raja Saheb v. Simji Raja Saheb.

Spencer, J.

the Mangala Vilas people who represented the descendants of the Rajah by sword wives, filed a suit, O. S. No. 43 of 1913, against the two sons of Rajaram Ingle *alias* Sarfoji Rajah, who was adopted on the 1st of July 1863 by Kamakshi Bai Saheba as the adopted son of her deceased husband. O. S. No. 43 of 1913 was dismissed, the Subordinate Judge observing that the Devasthanams were handed back to the family represented by Kamakshi Bai Saheba as the head of it. He said—

"The grant is to a single individual or sole trustee and there can be no claim for participation The same will therefore pass to the head of the family for the time being The senior Ranee acted as such in succession and on the last Ranee's death the senior representative of the family is the 1st defendant. He is therefore entitled to be the sole trustee."

That case came to be heard before Kumaraswami Sastri, J. and myself on appeal and our decision appears in *Ayiswaryanandaji Saheb* v. *Sivaji Raja Saheb* (3). The appeal was dismissed and the judgment of the Lower Court confirmed. In so doing, I observed that if it were necessary for the 1st defendant to prove that sole trusteeship was an incident of this hereditary trust, I should be prepared to find it proved. Kumaraswami Sastri, J. found it difficult to accept the argument for the 2nd defendant that the management should be confined to the 1st and 2nd defendants by turns to the exclusion of the illegitimate sons. He observed—

"Either the office is impartible and descends on the eldest member of the senior line, or it should be treated as partible and turns given to all those who are entitled to share in the family properties. There is no principle on which the office could be confined to the first and second defendants to the exclusion of the Mangala Vilas branch."

After the Subordinate Judge had decided O. S. No. 43 of 1913, on 1st July, 1918, and found that the grant was to a sole trustee and that the 1st defendant was the senior representative of the family and thus entitled to be sole trustee, the younger son, who was the 2nd defendant in that suit, instituted the present suit for a declaration that the two brothers, sons of the adopted son, should be declared to be jointly entitled to the management of the Devasthanams and the properties belonging thereto under the will of Ranee Jijamba Bai Saheba.

The plaintiff in the present suit put in a memorandum of objections to the appeal in O. S. No. 43 of 1919 in which he took the point that the Lower Court was wrong in holding that the 1st defendant was the sole trustee of the Devasthanams and in adjudicating between the claims of 1st and 2nd defend-

3. (1925) I L R 49 M 116: 49 M L J 568.

ants *inter se*. When we disposed of the appeal in that suit, we dismissed the memorandum of objections of the 2nd respondent. The present suit being instituted to obtain a declaration as to the character of the trusteeship which was decided in a prior suit and appeal, it is urged for the respondent that the matter is *res judicata* and that the suit must fail on that ground alone.

When we held in Appeal No. 64 of 1920 [*Ayiswaryanandaji Saheb* v. *Sivaji Raja Saheb* (3)], that sole trusteeship was one of the incidents of this trust, we were not adjudicating upon the claims of the 1st and 2nd defendants in that suit *inter se*. The finding that sole trusteeship was an incident of the institution was held sufficient to defeat the claim of the illegitimate children. No doubt, the Memorandum of Objections was dismissed. But in that suit the present plaintiff and the defendant were ranged on the same side, and on this account I should not be prepared to deny one of them the right to prove his individual case against his brother if he has materials upon which he may establish that the right of trusteeship is joint and not single.

A material piece of evidence which was not considered by us in that appeal is an agreement filed as Ex. A (1) in which the appellant and the respondent in 1915 mutually agreed to appoint a common agent to manage the Devasthanams and that they should each take it in turns to be the managing trustee for one year at a time.

For the appellant it is now urged that this agreement constituted a *bona fide* settlement of a disputed claim and that the elder brother, who is the respondent in the appeal, is bound thereby. In his oral evidence the respondent stated that himself and his brother were on good terms at the time of the agreement and that there was no dispute between them, but he entered into the agreement because their agents or managers were disputing and he personally was under the mistaken impression that Jijamba Bai Saheba had a right to devise the trusteeship by will and that when he understood that he was labouring under a mistake, he took legal advice and read the judgment of the Subordinate Judge in O. S. No.43 of 1913. His brother the appellant gives a somewhat different account. He states that the object of the agreement was to avoid misunderstanding between the respondent and himself. But his second witness deposes that there were no disputes or misunderstandings between the parties and that the

3. (1925) I L R 49 M 116: 49 M L J 568.

Pratapa Simha Raja Saheb v. Sivaji Raja Saheb.

Spencer, J.

disputes were between their agents. If the parties were acting under a mutual mistake as to what their rights were, thinking that they were jointly entitled to the management of the Devasthanams, they will not be bound by such an agreement. Vide *Cooper* v. *Phibbs* (4) and *Daniell* v. *Sinclair* (5).

I am of opinion in the first place that Ex.A(1) does not purport to be a *bona fide* settlement of an existing dispute between the parties to it as there was no dispute then as to which of the brothers should be the sole trustee in the event of its being found that sole trusteeship was a characteristic feature of the trust, and secondly, I think that the parties had no power to alter the scheme of the institution at their own will and pleasure as if they were settling some private right. [*See* the observations in *Ayiswaryanandaji Saheb* v. *Sivaji Raja Saheb* (3)]. In *Sivaji Raja Saheb* v. *Ayiswaryanandaji Saheb* (6) this Court decided an appeal relating to proceedings between the Mangala Vilas people and the present appellant and respondent as regards the appointment of a Receiver for the Devasthanam property. At that time it was considered that, rightly or wrongly, the two sons of the adopted son were in possession of the Devasthanam property, both parties assuming that they were rightly in possession. If therefore the respondent was mistaken his mistake was not without justification.

In the hearing of this appeal I have been shown no reason for departing from my conclusion in the prior appeal that the Rajahs of Tanjore who founded these religious institutions intended that they should be managed by a sole trustee. That conclusion is sufficient to dispose of the present appeal and to confirm the right of the elder son, who is the respondent, in his management during his life-time. But one or two minor points have been raised which may be briefly disposed of.

It was argued that the adoption by Kamakshi Bai Saheba of the father of the parties divested the widow of her estate and vested it in the adopted son, that his widow having continued nevertheless to manage the estate acquired a prescriptive right against the adopted son which she was entitled to devise by will. In her will (Ex. N) she bequeathed her right of management of the trust to both the sons of the adopted son jointly and she personally delivered over the keys to them both.

3. (1925) I L R 49 M 116 49 M L J 568.
4. L R 2 H L 149.
5. (1881) 6 A C 181 at 190.
6. (1915) 29 M L J 209.

Ry. Pratapa Simha Raja Saheb *v.* Ry Simji Raja Saheb

Spencer, J.

The Hindu law of divestment of a widow's estate by an adopted son applies to the property that she inherits from her husband. The trust property, which Government gave back to her by the grant of 1863 in order that she should mana-ge as head of the family for the time being, created a right which was different from the right of a widow who enjoys property for her life-time after the death of her husband. In this view she acquired no prescriptive right by managing the property. There can be no *Stridhanam* right in trust property and nothing during her management happened to destroy the institution of sole trusteeship, nor could the usage of the institution be altered by mere custom for one or two generations. Moreover by her enjoyment as widow of the last male owner she could not prescribe for anything higher than a woman's estate. Lastly, she has no power to alter by will the natural course of devolution of a trust already in existence.

Then it was urged that the proceedings of the Sub-divisional First Class Magistrate in 1912 have become final under Art. 47 of the Limitation Act as no suit was brought to establish the right of the defendant within one year. The Magistrate's order confirmed the possession of the two parties in this appeal until evicted in due course of law, on his finding that they should be considered to be in actual possession, and the proceedings were instituted by one of the sword wives' sons and ended unfavourably to him. No doubt, as he did not bring a suit within the limitation period he would have been barred from raising the question of actual possession after the period of limitation. But, there was no necessity arising out of that order for the two successful parties to bring a suit to declare which of the two was entitled to a separate right of possession.

It is then suggested that the plaintiff in this suit, having assisted the defendant to defend the suit filed by the sword wives' sons (O. S. No. 43) and having shared the expenses of that litigation, the latter is estopped from now claiming a right subversive of his brother's interest. In our final judgment in the appeal we directed that the costs of the two respondents should be paid out of the Devasthanam estate. There is thus no question of estoppel arising out of the conduct of the prior suit and appeal, and this contention fails.

Ramesam, J.

The result is that the appeal is dismissed with costs of the respondent payable by the appellant.

Ramesam, J. :—I agree.

A. S. V. —— *Appeal dismissed.*

R—83

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE PHILLIPS AND MR. JUSTICE MADHAVAN NAIR.

P. Hajee Batcha Saheb ... *Appellant** (*Petitioner*)

v.

M. Mahomed Ebrahim Saheb ... *Respondent* (*Respondent*).

Hajee Batcha Saheb v. Mahomed Ebrahim Saheb.

Civil Procedure Code, O. 21, R. 84—"Property shall forthwith be re-sold"—Want of bidders at the re-sale—Effect of—Liability of original purchaser—Procedure.

A property was sold by Court-auction in three lots; the first lot was put up and knocked down for Rs 1,850. Before the 25 per cent deposit was paid, the sale of the other two lots was proceeded with, but meanwhile the purchaser of the first lot wanted to retract his bid on the ground that he had been bidding under a mistake. After the sale of lots Nos. 2 and 3, lot No. 1 was again put up for sale, but there were no bidders. The decree-holder thereupon applied to the Court for an order directing the purchaser to pay the purchase money of Rs 1,850 into Court and on default for an order directing re-sale, and for recovery of any deficit on such re-sale from the purchaser personally. *Held,* (1) the requirements of O. 21, R. 84 were sufficiently complied with when the property to be re-sold was actually put up for re-sale and the defaulting purchaser cannot be absolved from liability merely because there were no bidders; but (2) as the decree-holder claimed a re-sale in the alternative, in the interests of justice it would be advisable to order a re-sale, and if there is any deficit, it should be recovered from the original purchaser.

Appeal against the order of the District Court of North Arcot, dated 20th July, 1923 in E. P. No. 3 of 1923 in O. S. No. 23 of 1919 on its file.

S. Panchapakesa Sastri for *S. Duraiswami Aiyar* for appellant.

K. S. Krishnaswami Aiyangar and *T. N. C. Srinivasa Varadhachariar* for respondent.

The Court delivered the following

Phillips, J.

JUDGMENTS :—*Phillips, J.* :—The facts of this case are as follows:—

A certain property was sold by Court-auction in three lots on 4th September, 1922. The first lot was put up and knocked down to respondent's bid for Rs. 1,850. The 25 per cent. deposit was not paid at once but the sale of the second lot was proceeded with. While that was going on, the respondent wished to retract his bid for the first lot on the ground that he had been bidding under a mistake. The officer conducting the sale refused to allow him to do so and this order was confirmed by the Court on a petition put in two days later, namely, on the 6th of September, 1922. The first lot was again put up for sale after lots 2 and 3 but no bids were secured. The

*A.A.O. No. 476 of 1923. 26th February, 1926.

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Phillips, J.

decree-holder then put in an execution (with which we are now concerned), dated 27th November, 1922. He asked (1) that the respondent should be directed to pay the purchase money of Rs. 1,850 into Court, (2) that in default of such payment the said lot No. 1 should be ordered to be re-sold, and (3) that any deficit on such re-sale should be recovered from the respondent by issue of warrant of arrest. The District Judge has dismissed this petition on the ground that the property should have been re-sold forthwith on failure to deposit the 25 per cent. of the purchase money, and that therefore the petitioner should put in a fresh execution petition for the sale of the property. When the respondent failed to make the deposit, the officer conducting the sale put up lot No. 1 after lots Nos. 2 and 3 had been sold. No bids were received and the matter was reported to the Court. The question that arises now is whether there has been a re-sale of the property as directed in O. 21, R. 84. It is not disputed that the property was put up for sale and that if there had been any bids it would have been sold, but it is contended for the respondent that inasmuch as no bids were received the property cannot be deemed to have been re-sold. The point is not free from doubt, for in the strict meaning of the word "re-sold" it would appear that there must be an actual sale of the property, but what is to happen if it is impossible to re-sell the property? Under O. 21, R. 71, any deficiency of price which may happen on a re-sale by reason of the purchaser's default shall be recoverable from the defaulting purchaser under the provisions relating to the execution of a decree for the payment of money. If the property had realised one rupee, the defaulting purchaser would have been liable to pay the balance of Rs. 1,849. In the event of there being no bids at all, is he to escape this liability? It is certainly, not the intention of the Act that he should escape scot-free in such circumstances, and it only remains to be determined whether the words "shall forthwith be put up for sale" were complied with. It is undoubted that on principle the words should have this meaning and I should feel inclined to hold that the provisions of the section had been complied with when the property is put up for re-sale.

In the present case, however, I think this appeal may be decided on other grounds. The appellant had put in an alternative prayer that the property should again be resold. When the re-sale failed for want of bids, the conducting officer should have adjourned the sale and continued

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it until he had obtained a bid. His petition, therefore, to re-sell the property should have been ordered.

The objection is taken that if a re-sale is now ordered more than two years after the original sale, the conditions of the section that the re-sale should be held forthwith would not be complied with, but it must be remembered that a re-sale was held and failed and that the appellant within a reasonable time put in an application to hold the sale again. The fact that the prayer was refused by the District Court with the result such re-sale has been postponed for two years can hardly affect the question. An application was made within a reasonable time and we must take the date of the application as being the date on which the fresh re-sale should have taken place. Although then I should be prepared to say that the respondent was liable to make good the deficit of Rs. 1,850 yet, in view of what has taken place, I think it is advisable in the interests of justice that the property should again be resold and if there is any deficit it should be recovered from the respondent. The appeal is accordingly allowed and the property directed to be resold at once.

After the sale has been held and confirmed, it will be open to the appellant to apply for the recovery of the deficit, if any, from the respondent in pursuance of the prayer in his petition.

The respondent will pay the appellant's costs of this appeal.

Madhavan Nair, J.

Madhavan Nair, J. :—I agree. It is difficult to say that property is "resold" when there are no bidders at the auction and consequently the sale proves abortive. But, I do not think the legislature intended that the word "resale" should be so strictly understood. In this respect, the requirements of O. 21, R. 84 are sufficiently complied with when the property to be re-sold is actually put up for re-sale. The defaulting purchaser should not be absolved from liability for want of bidders at the auction. In the circumstances of this case, I agree with the order proposed by my learned brother.

T. S. V. *Appeal allowed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.
PRESENT :—MR. JUSTICE REILLY.

Periya Karupan Chettiar and others ... *Petitioners** (3rd *Respondent and L. Rs.*)

v.

Somasundaram Chetti and another ... *Respondents* (*Petrs.*).

Karupan Chettiar
v
Somasundaram Chetti

Civil Procedure Code, O. 21, R. 90—Rateable distribution of sale proceeds—Person entitled to—Attachment by Courts of lower and higher grade—Sale by Court of lower grade—Decree-holder applying for execution to Court of higher grade and attaching property before sale—Right to apply to Court of lower grade to set aside sale—Sale proceeds held by Court of lower grade at time of application—Effect—Duty of Court of higher grade to send for sale proceeds from Court of lower grade—Transfer of proceeds—Order in revision for.

Property of the same judgment-debtor, which had been attached by the District Munsif and by the Subordinate Judge, was sold by the District Munsif in ignorance of the attachment in the Subordinate Judge's court. *S*, who had also obtained a decree against the same judgment-debtor, never applied to the District Munsif's Court for the execution of his decree, but before the sale he applied for execution to the Subordinate Judge's Court and attached the property in question.

On an application made by *S* to set aside the sale of the property by the District Munsif's Court under O 21, R. 90, Civil Procedure Code, *held* that the was a person entitled to share in the rateable distribution of the proceeds of the sale and so competent to apply under O. 21, R. 90; and that the fact that the sale proceeds had not reached the Subodrinate Judge's Court at the time when he made the application to the District Munsif under R. 90 did not prevent him from being a person entitled to share in a rateable distibution within the meaning of that rule; though the distribution could not be actually made until the proceeds reached the proper Court for distributing them.

When a Court of a lower grade sells property in exeucution in ignorance of an attachment thereof by a Court of a higher grade, the latter Court can and should call for the proceeds of the sale from the former Court in order that they may be distributed in the Court of higher grade in accordance with the principle of S 63, Civil Procedure Code.

In revision, the High Court directed the transfer of the sale proceedings by the Court of lower grade to the Court of higher grade.

Petition under S. 115 of Act V of 1908 praying the High Court to revise the decree of the District Court of South Arcot in A. S. No. 143 of 1924 preferred against the order of the Court of the District Munsif of Cuddalore in M. P. R. 333 of 1923 in E. P. R. 343 of 1923 in C.S. No. 343 of 1920 on the file of the High Court, Madras.

N. Chandrasekara Aiyar for petitioners.

K. Narasimha Aiyar for respondents.

The Court delivered the following

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*C. R. P. No. 926 of 1925. 11th August, 1926

Karupan Chettiar v. Somasundaram Chetti.

JUDGMENT :—The question is whether Somasundaram Chettiar is a person entitled to share in the rateable distribution of the proceeds of the sale in execution in the District Munsif's Court and so competent to maintain his petition under R. 90 of O. 21, Civil Procedure Code to set that sale aside. Somasundaram Chettiar never applied to the District Munsif's Court for the execution of his decree; but before the sale he had applied for execution to the Subordinate Judge's Court and had attached the property in question. Under S. 63, Civil Procedure Code, the proper Court to realise the property was the Court of higher grade that is the Subordinate Judge's Court. But apparently in ignorance of the attachment in the Subordinate Judge's Court the District Munsif ordered sale in his Court. The learned District Judge is of opinion that in this case the proceeds of the sale though actually received by the District Munsif must be deemed to have been received by him on behalf also of the Subordinate Judge's Court, in which the property had been attached. He adopts this view on the strength of *Narasimhachariar* v. *Krishnamachariar* (1), where it was decided that, when certain money had been attached by several Courts but collected by the Court of highest grade in accordance with S. 63, Civil Procedure Code, receipt of the money by the highest Court must be regarded as receipt by or on behalf of all the Courts concerned in which the money had been attached. It is argued for petitioner that the converse of that fiction ought not to be adopted, viz., that receipt of assets by a Lower Court should be deemed to be also receipt by or on behalf of a Court of a higher grade in which the property has been attached. In the present case I do not think it necessary to apply any such fiction. The Subordinate Judge could have and should have called for the proceeds of the sale from the District Munsif's Court in order that they might be distributed in the Subordinate Judge's Court in accordance with the principle of S. 63, Civil Procedure Code. There was the course declared to be correct in *Deekappa Mallappa* v. *Chanbasappa Rachappa* (2). I prefer to follow that decision rather than *Milkanta Rai* v. *Gosto Behar Chatterjee* (3), in which the opinion was expressed that an application would be made to the District Judge for the transfer of the sale proceeds. But to prevent any possible difficulties I now direct, as was directed in both the cases just mentioned,

1. (1914) 26 M L J 406. 2 (1925) I L R 49 Bom. 655.
3. (1917) I L R 46 Cal. 64.

that the sale proceeds be transferred from the District Munsif's Court to the Subordinate Judge's Court. Somasundaram Chettiar is undoubtedly a person entitled to share in a rateable distribution of these sale proceeds in the Subordinate Judge's Court. He is therefore in my opinion a person entitled to attack the sale in the District Munsif's Court under R. 90 of O. 21, Civil Procedure Code. The fact that the sale proceeds had not reached the Subordinate Judge's Court at the time when he made the application to the District Munsif under R. 90 did not prevent him from being a person entitled to share in a rateable distribution within the meaning of that rule, though the distribution could not be actually made until the proceeds reached the proper Court for distributing them. I therefore agree with the order of the learned District Judge in the present case though not exactly for his reasons. Subject to the direction given above for the transfer of the sale proceeds to the Subordinate Judge's Court this petition is dismissed with costs.

A. S. V. *Appeal dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE WALLER AND MR. JUSTICE MADHAVAN NAIR.

Sannidhi Gundayya ... *Appellant** (*Appellant in Second Appeal No.* 121 *of* 1924 *on the file of the High Court defendant*).

v.

Illoori Subbayya and another ... *Respondents* (*Respondents in the said S. A. No.* 121 *of* 1924—*Plaintiffs*).

Sannidhi Gundayya v. Subbayya.

Contract—Construction—Performance absolute or impliedly conditional—Delivery of goods by railway waggons—Contract for—Government restrictions on supply of waggons—Failure of contractor to perform on account of—Liability for—Existence of restrictions known to parties—Effect.

The defendant entered into a contract with the plaintiffs for the delivery of certain bags of rice. The contract contemplated delivery by railway waggons. As a war measure the Government had imposed "waggon restrictions" and "priority certificates" all over the Presidency; and the existence of those restrictions was well-known to all the parties. Owing to the shortage of waggons on account of the enforcement of the rules the defendant was not able to perform his contract. In a suit by the plaintiffs for damages for breach of contract, the defendant therefore pleaded impossibility of performance as a defence to the suit.

Held, that the reasonable view of the contract was that the defendant agreed to supply the promised number of bags of rice if after using his best

*L. P. No. 64 of 1925. 6th May, 1926.

Sannidhi Gundayya v. Subbayya.

endeavours he was able to secure the necessary number of waggons, that the obligation to perform the contract was therefore, not absolute, but impliedly conditional; and that as the defendant failed to secure the waggons in spite of his best endeavours, he was not liable.

Appeal under cl. 15 of the Letters Patent against the judgment of the Hon'ble Mr. Justice Odgers, dated 17th February, 1925 in S.A. No. 121 of 1924 preferred to the High Court against the decree of the District Court of Kurnool in A. S. No. 128 of 1921 (O. S. No. 57 of 1920 on the file of the Court of the Subordinate Judge of Kurnool—O. S. No. 17 of 1919, District Court, Kurnool).

T. M. Krishnaswami Aiyar and *W. Kothandaramiah* for appellant.

K. V. Krishnaswami Aiyar, *Krishna Arya* and *Viraraghavalu* for respondents.

The Court delivered the following

JUDGMENT :—This is an appeal under S. 15 of the Letters Patent against the judgment of Odgers, J., in S.A. No. 121 of 1924.

The facts of the case are simple and the findings are not disputed. The plaintiffs sued the defendant-appellant for damages for breach of contract to deliver certain bags of rice. The defendant had no license for importing rice but it is admitted that the parties knew that the defendant's friend "Ayyalu" had a license and that he would enable the defendant by his good offices to perform the contract with the plaintiffs. It is not disputed that the contract contemplated delivery by railway waggons. As a war measure the Government had imposed "waggon restrictions" "priority certificates" all over the Presidency, and this interfered with the free and easy transport of rice. The existence of these restrictions was well-known to all the parties. Owing to the shortage of waggons on account of the enforcement of the rules the defendant was not able to perform his contract. He therefore pleaded impossibility of performance as a defence to the suit. Odgers, J., held in second appeal that, since the parties knew of the existence of these restrictions, it was not open to the defendant to import into the contract an implied condition that the contract was not to be performed if he was not able to secure the sufficient number of waggons for delivery.

The defendant-appellant relies on S. 56 of the Indian Contract Act. According to the 2nd para. of this section "A contract to do an act which, after the contract is made, becomes impossible, ... becomes void, when the act becomes impossible ...." "By the Common Law of England a

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man who promises without qualification is bound by the terms of his promise. If the parties do not mean their agreement to be unconditional, it is for them to qualify it by such condition as they think fit (Pollock and Mulla, page 318). The rigour of this absolute rule has been gradually and very considerably relaxed by the recognition of "the doctrine of the implied term" by which, on the ground of impossibility, parties have been excused from performing their contracts by relying on conditions which may be implied from the nature of the contract and the surrounding circumstances. It does not appear as observed by Sir Frederick Pollock that the law embodied in S. 56 is materially divergent from the English doctrine.

In *In re, Anglo-Russian Merchant Traders, Ltd. and John Batt and Co. (London), Ltd.* (1), by a contract made in London, 50 tons of aluminium had to be supplied to Vladivostok during a specified time. At the date of the contract, there was to the knowledge of both parties a prohibition against the export of aluminium from England except on licence granted by the British Government. The sellers were unable to obtain a permit and the aluminium was not exported. The Court of Appeal held that the contract was discharged by the impossibility of performance. With reference to the argument that the seller's obligation under the contract was absolute, Viscount Reading, C. J. observed thus :—

> "There was at the time of making the contract and at all material times a prohibition against the export of aluminium except under a licence. If a licence cannot be obtained aluminium cannot be shipped, and I cannot see why the law should imply an absolute obligation to do that which the law forbids. A shipment contrary to the prohibition would be illegal, and an absolute obligation to ship could not be enforced. I cannot agree that, in order to give to the contract its business efficacy, it is a necessary implication that the sellers undertook an absolute obligation to ship whether a licence was or was not obtained."

In *In re, Anglo-Russian Merchant Traders, Ltd. and John Batt and Co. (London), Ltd.* (1) Scrutton, L. J. also used language to the same effect :—

> "It is sufficient in order to give business efficacy to the contract to hold that no higher obligation can be implied than that the sellers would use reasonable diligence to get a licence."

The learned Judges refused to read the contract as imposing an obligation which would imply that the parties had undertaken to carry out an arrangement against law. They therefore held that the reasonable view of the contract in that

1. (1917) II K B 679 at 689.

case was that the sellers sold subject to their being able to ship under a licence and that they impliedly undertook to use their best endeavours to obtain a licence.

In our opinion the present case falls within the principle of the above ruling. It has been found that the defendant used his best endeavours to secure the waggons but failed. If we regard the obligation to deliver the bags of rice as absolute in spite of the waggon restrictions and priority rules enforced by Government, it would imply that the seller had undertaken to perform a contract contrary to the rules enforced by the Government and hence illegal. The argument that the parties should have provided for the failure of performance in the contract itself and since that was not so done, the defaulting party should suffer cannot apply in a case like the present where the parties knew that owing to the restrictions introduced by Government rules, shortage of waggons may occur and performance for that reason may be rendered impossible. As pointed out by Viscount Reading, C. J. in *In re, Anglo-Russian Merchant Traders, Ltd. and John Batt and Co. (London), Ltd.* (1), so, in this case, we cannot see "why the law should imply an absolute obligation to do that which the law forbids". The learned vakil for the appellant was not able to distinguish the present case from the case in *In re, Anglo-Russian Merchant Traders, Ltd. and John Batt and Co. (London), Ltd.* (1). In our opinion the reasonable view of the contract in this case is that the seller agreed to supply the promised number of bags of rice if after using his best endeavours he was able to secure the necessary number of waggons. The obligation to perform the contract was not therefore absolute, but impliedly conditional. In this view we set aside the decision of the learned Judge and restore the decree of the Trial Court. The appellant will get the costs in the District Court and in the High Court.

A. S. V. *Appeal allowed.*

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1. (1917) II K B 679.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—SIR C. V. KUMARASWAMI SASTRI, *O.C. J.*, AND MR. JUSTICE CURGENVEN.

The Firm of Pannaji Devichand consisting of partners and others ... *Appellants* in Appeal No. 56 of 1922 and Respondents in Appeal No. 149 of 1922 (Defendants)*

v.

Kapurchand and others ... *Respondents in Appeal No. 56 of 1922 and Appellants in Appeal No. 149 of 1922 (Plaintiffs.)*

Firm of Pannaji Devichand *v.* Kapurchand.

Indian Companies Act, S. 4—Unregistered companies consisting in all of more than 20 persons—Partnership between, for the purpose of carrying on business—Legality—Suit for dissolution—Maintainability—'Business' in S. 4—Test of—'Persons' in S. 4—Unregistered companies if units for purpose of S. 4.

Four unregistered firms entered into one partnership in respect of certain bales of yarn. The total number of persons constituting the four firms consisted of 22 persons. In a suit brought for dissolution of that partnership and the taking of partnership accounts, it appeared from the plaint allegations that although a number of bales were purchased at one time, sales were to go on, profits were to be realised, and those profits were to be divided. There was nothing in the plaint or in the agreement which was referred to in it to show that the four persons who signed the contract as representing the four firms did it for their own individual benefit, the firms being only a kind of sub-partners with them in the venture. On the other hand the plaint gave the names of all the persons of each of the firms as persons who were entitled to the benefit of the contracts and subject to the obligations thereof.

Held, that on the plaint allegations the partnership which was sought to be dissolved was illegal under S. 4 of the Indian Companies Act, and that the plaintiff was not therefore entitled to any relief.

A single venture where a single article or a number of articles on a single contract are purchased and sold may not amount to a business within the meaning of S. 4. But the plaint read as a whole shows that there was in the present case a business carried on within the meaning of that section.

Under S. 4 what the Court has to see is whether, where an association or partnership is formed for purposes of carrying on a business, each of the members will be liable individually upon contracts made and whether each would have rights accruing to him upon such contracts. The mere fact that the persons forming the association or partnership choose to put themselves into groups each of which goes by a certain partnership name would not affect the question.

Persons forming unregistered companies should not be taken as units for the purpose of S. 4 of the Companies Act.

Appeals against the decree of the Court of the Subordinate Judge of Bellary dated 1st December, 1921 in O. S.

*Appeals Nos. 56 and 149 of 1922. 11th August, 1926.

Firm of Pannaji Devichand v. Kapurchand.

No. 56 of 1920 (O. S. No. 52 of 1918 on the file of the District Court, Bellary).

A. Krishnaswami Aiyar and *V. S. Narasimhachari* for appellants.

The Advocate-General and *C. Sambasiva Rao* for respondents.

The judgment of the Court was delivered by

Kumaraswami Sastri, O.C.J.

The Officiating Chief Justice :—This is an appeal against the decree of the Subordinate Judge in a suit for dissolution of partnership and the taking of partnership accounts. The plaint states that the partnership was formed between four firms which were unregistered. They were four unregistered firms which according to the plaint entered into one partnership in respect of certain bales of yarn. It is alleged that business was carried on and profits accrued and the prayer is that an account be taken of the profits due to the plaintiffs and given to them.

When the appeal was taken up it was found that the total number of persons constituting the four firms which entered into this partnership to deal as a combined concern with these goods consisted of 22 persons and the question arose as to how far on the plaint such a partnership would be legal having regard to S. 4, cl. (2) of the Companies Act which states that—

"No company, association, or partnership, consisting of more than twenty persons, shall be formed for the purpose of carrying on any other business that has for its object the acquisition of gain by the company, association, or partnership, or by the individual members thereof, unless it is registered as a company under this Act, or is formed in pursuance of some other Act, or of Letters Patent."

Cl. 1 of S. 4 deals with an association carried on for the purpose of banking and cl. 2 refers to other business carried on. There can be little doubt on reading the plaint that the various persons mentioned in it who amount to more than 22 in number entered into the contract for the purchase of 2,000 bales with certain definite shares, that business did go on and that profits accrued as to which an account and division is sought. On the face of the plaint we find that 22 persons have combined to carry on the business mentioned in the plaint and to share in the profits. The first and main contention of the learned Advocate-General is that there was no business within the meaning of S. 4 so as to make the association illegal and, secondly, that even though four private firms joined together to carry on business, and even though each of these firms might consist of number of persons, we should not for

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the purpose of S. 4 take into account the total number of persons but only the number of firms which joined together to carry on the venture.

As regards the first contention that there is no business carried on within the meaning of S. 4 references have been made to *Smith* v. *Anderson* (1) and *Kirkwood* v. *Gadd* (2). In order to determine whether what is carried on is a business or not one has to see what are the allegations in the plaint as to what the parties did. No doubt a single venture where a single article or a number of articles on a single contract are purchased and sold may not amount to a business. But on the allegations in the plaint although a number of bales were purchased at one time, sales were to go on, profits were to be realised and those profits were to be divided. Reading the plaint as a whole it seems to us that this is not a single venture which would take it out of the definition of S. 4.

The next point taken is that we must for purposes of S. 4 treat each of the partnerships, although they were not registered, as a single legal entity. Reliance is placed on S. 3, cl. 39 of the General Clauses Act which runs as follows :—

" 'Person' shall include any company or association or body of individuals, whether incorporated or not."

But S. 3 of the General Clauses Act begins by saying that the definition shall apply unless there is anything repugnant in the subject or context of the Act. We think that under S. 4 of the Companies Act what we have to see is whether, where an association or partnership is formed for purposes of carrying on a business, each of the members will be liable individually upon contracts made and whether each would have rights accruing to him upon such contracts. The mere fact that the persons forming this association or partnership choose to put themselves into groups each of which goes by a certain partnership name would not affect the question as it would otherwise be possible for more than 20 persons to carry on business in contravention of the Act simply by saying that each of them is a member of a certain partnership which in turn is unregistered. In the present case there is nothing in the plaint or in the agreement which is referred to in the plaint to show that the four persons who signed the contract as representing the four firms did it for their own individual benefit, the firms being only a kind of sub-partners with them in the venture. The plaint negatives any such contention as it gives the names of all the

1. (1880) 15 Ch D 247. 2. (1910) A C 422 at 431.

Firm of Pannaji Devichand v. Kapurchand.

Kumaraswami Sastri, O.C.J.

persons of each of the firms as persons who are entitled to the benefit of the contracts and subject to the obligations thereof. We have been referred to a decision in *Akola Gin Combination* v. *Northcote Ginning Factory* (3) where it was held that the word 'person' in S. 4 of Act VI of 1882 denotes individuals and does not include bodies of individuals which definition would be repugnant to the subject and context of the section. We agree with this decision and the reasons which led the learned Judge to hold that to say that persons forming unregistered companies should be taken as units for the purpose of S. 4 of the Companies Act would be to defeat the intention of the Act and to allow a number of persons to enter into bodies for the purpose of defeating S. 4. With reference to the decision in *Mewa Ram* v. *Ram Gopal* (4) it is sufficient to say that that was a case of a Hindu joint family where the manager acted. In the present case there is no question of a Hindu joint family entering into a partnership. It has been held in *Gangayya* v. *Venkataramiah* (5) that in the case of Hindu joint families each member is not a partner but is only in the position of a sub-partner. Where a plaintiff comes to Court on allegations which on the face of them show that the contract of partnership on which he sues is illegal, the only course for Courts to pursue is to say that he is not entitled to any relief on the allegations made as the Courts cannot adjudicate in respect of contracts which the law declares to be illegal.

We are of opinion that having regard to the plaint the partnership which is sought to be dissolved is illegal having regard to S. 4 of the Indian Companies Act. The suit fails and the plaintiff will not be entitled to any decree. We therefore reverse the decision of the Subordinate Judge, allow the appeal and dismiss the plaintiff's suit with costs throughout.

Appeal No. 149 *of* 1922 :—This appeal follows the decision in the above appeal. It is also dismissed. No costs.

A. S. V. *Appeals allowed.*

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3. (1914) 26 I C 613.
4. (1926) I L R 48 A 395.
5. (1917) I L R 41 M 454: 34 M L J 271.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE RAMESAM AND MR. JUSTICE REILLY.

K. R. Muthu A. R. Arunachalam Chetty ... *Appellant** (*Plaintiff*)

v.

David, Esq., The Official Receiver, Ramnad District, at Madura and others ... *Respondents (Defts.).*

Arunachalam Chetty *v.* David, Esq.

Civil Procedure Code, S. 80—Notice required by—Necessity—Official Receiver—Intended sale by—Suit to restrain—Notice prior to suit if necessary in case of—"Act purporting to be done"—Meaning.

The suit was for a declaration that the suit properties belonged to the plaintiff and defendants 3 and 4 and for a perpetual injunction restraining the 1st defendant, the Official Receiver of Ramnad, from selling them as the properties of the 2nd defendant. The Court below dismissed the suit on the ground that the plaintiff had failed to give to the Official Receiver the two months' notice required by S. 80, Civil Procedure Code; before the filing of the suit.

Held, that the suit was really to restrain the intended sale by the Official Receiver, and that it was not unsustainable for want of notice.

The phrase "act purporting to be done" in S. 80 is confined to past acts and does not include a future act.

Per Ramesam, J.—In respect of acts of public servants done in their official capacity S. 80 applies only in the case of past acts completed or begun but incomplete and not to threatened acts.

Appeal against the decree of the Court of the Subordinate Judge of Sivaganga in O. S. No. 113 of 1924.

C. S. Venkatachariar for appellant.

T. M. Krishnaswami Aiyar for respondents.

The Court delivered the following

JUDGMENT :—*Ramesam, J.* :—The plaintiff is the appellant before us. The suit was for a declaration that the suit properties belonged to him and defendants 3 and 4 and for a perpetual injunction restraining the 1st defendant, who was the Official Receiver of the Ramnad District, from selling them as the properties of the 2nd defendant in I. P. No. 9 of 1917 on his file. The Official Receiver advertised the suit properties for sale on 10th November, 1924. On the 5th November the plaintiff sent a notice of suit to the 1st defendant and the suit was filed on the 7th November, 1924. The Subordinate Judge of Sivaganga dismissed the suit on the ground that two months have not elapsed before the filing of the suit and after the giving of notice. The plaintiff in appeal contends that a notice under S. 80, Civil Procedure Code, is

Ramesam, J.

*Appeal No. 15 of 1926. 27th August, 1926.

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Ramesam, J.

unnecessary. He concedes that the Official Receiver is a public servant but argues that the suit is not in respect of an act purporting to be done in his official capacity. His argument is that the suit is only in respect of a threatened act and not in respect of an act which was begun, and therefore the section does not apply. This contention of the appellant is supported by the decision of the Calcutta High Court in *Ganoda Sundary Chaudhurani* v. *Nalini Ranjan Raha* (1) and other decisions of the Bombay High Court which will be referred to presently. In *Ganoda Sundary Chaudhurani* v. *Nalini Ranjan Raha* (1), Woodroffe, J., relies on the word "done", but I am not satisfied with this line of reasoning. The phrase is not "an act done" but "an act purporting to be done" and the words "to be done" are not inconsistent with a future act. It is possible to describe a future act by a phrase using the words " purporting to be done" by using other appropriate words such as "future" or "intended" indicating that a future act was meant or by the mere use of the future tense in the sentence. As Pratt, J., points out in *Muradali Shamji* v. *B. N. Lang* (2), one mode of indicating past acts only is by using the words "purporting to have been done". The phrase "purporting to be done" uses the present indefinite form and is grammatically wider than the phrase "purporting to have been done". While conceding all this I am still of opinion that as a matter of an ordinary idiom the whole phrase "an act purporting to be done" would ordinarily refer to past acts only whether finished or begun but incomplete and does not refer to future acts. The use of the perfect form is not ordinarily resorted to for describing past acts though grammatically more accurate and if a future act is meant it is expressly described by appropriate words. Where no such words are used, the phrase ought in my opinion to be ordinarily limited to past acts (unless the context requires one to extend it to future acts also there being no grammatical impediment to doing so)—as a matter of reasonable construction if not of grammatical necessity. The decision in *Secretary of State for India* v. *Gajanan Krishna Rao* (3) relates to a suit against the Secretary of State. In *Naginlal Chunilal* v. *The Official Assignee, Bombay* (4), where the suit was against the Official Assignee of Bombay, the Judges followed the decision of Cunningham, J., in *Shahebzadee Shahun Shah*

1. (1908) I L R 36 C 28 at 38.
2. (1919) I L R 44 B 555 at 560.
3. (1911) I L R 35 B 362.
4. (1912) I L R 37 B 243.

Begum v. *Fergusson* (5). Though I come to the same conclusion I do not wish to adopt that line of reasoning. The decision in *Naginlal Chunilal* v. *The Official Assignee, Bombay* (4) was followed in the case of *Secretary of State for India* v. *Gulam Rasul* (6). In *Muradali Shamji* v. *B. N. Lang* (2) Pratt, J., while differing from the above cases, was merely content to follow them sitting as a single Judge. In *Bhagchand Dagadusa* v. *The Secretary of State for India* (7), Kemp, J. observed :

"The suit is in respect of something the 2nd respondent is *going to do*, not in respect of something he *has done*. In my opinion, therefore, no notice is necessary so far as the suit is one for an injunction against the 2nd defendant."

The only Madras decision which touches the question is *The Superintending Engineer, II Circle, Bezwada* v. *Chituri Ramakrishna* (8). In that case, the suit was against the Superintending Engineer of Kistna District, and both the learned Judges held that the suit was bad for want of a proper notice on the ground that the suit related to a past act, the act being the order of the Engineer directing the removal of the image and the temple. There was considerable discussion in the judgment as to whether an order which states an intention would be an act and both the learned Judges held it would be. Spencer, J., decided the case on another ground and referred to the want of a proper notice only as an additional ground, but Sadasiva Aiyar, J., rested his judgment solely with reference to S. 80, Civil Procedure Code. It does not appear that the point whether the phrase "an act purporting to be done, etc." includes future act was raised by the vakil for the respondent. At any rate, it is not discussed in the judgment and therefore the judgment is not against the view I am taking. The fact remains that there is no decision against the view I am taking and there are several agreeing with it though on different lines of reasoning.

The learned vakil for the respondent besides arguing that the section is not confined to past acts only an argument above dealt with, also argues that this suit must be considered to be in respect of a past act, the past act being the advertisement of the Official Receiver announcing the sale of the suit properties. If the suit can be regarded as one in respect of a past act, the judgment in *The Superintending Engineer, II Circle, Bezwada* v. *Chituri Ramakrishna* (8), already mentioned, supports him. But I find it difficult to hold that the suit

2. (1919) I L R 44 B 555.
4. (1912) I L R 37 B 243.
5. (1881) I L R 7 C 499.
6. (1916) I L R 40 B 392.
7. (1923) I L R 48 B 87 at 153.
8. (1920) 39 M L J 151.

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is in respect of the advertisement. The reason for the suit, or, in other words, the cause of action for the suit may be furnished by the advertisement or some other similar past act of the 1st defendant, but it does not follow that the suit is in respect of that act. The relief sought is to restrain the sale and I think the only proper description of this suit is, "a suit to restrain the intended sale". I am therefore unable to accede to the argument of the learned vakil for the respondent on the second point.

The result is I hold that in respect of acts of public servants done in their official capacity the section applies only in the case of past acts completed or begun but incomplete and not to threatened acts, and therefore the suit is not unsustainable for want of notice. I would therefore allow the appeal and remand the case back for disposal according to law. Costs to abide the result. Court-fee paid in appeal will be refunded.

Reilly, J.

Reilly, J. :—Plaintiff instituted a suit for a declaration and for an injunction restraining the Official Receiver of Ramnad from selling the property concerned but did not give the Receiver notice as required by S. 80, Civil Procedure Code, two months before presenting his plaint. The question is whether S. 80, Civil Procedure Code, prohibits the institution of a suit for an injunction against an Official Receiver, who, it is admitted, is a public officer, unless the notice mentioned in the section has been given to the Receiver two months earlier. It is contended for plaintiff that as regards a public officer the section requires the notice to be given only if the suit to be brought against him is in respect of some act already done or at least partly accomplished and that, if the suit is in respect of a future act—some threatened, intended, contemplated or apprehended act—then no such notice is required. For defendant No. 1 it is contended that, if the act in respect of which the suit is brought is the act of a public officer and purports to be done by him in his official capacity, then, whether the act is past, present or future, the suit cannot be instituted unless the notice has been given two months earlier. The question which contention is correct depends on the interpretation of the words " in respect of any act purporting to be done by such public officer in his official capacity " in the section. Do those words cover only a past act or do they include also a future act ? On the surface by their mere grammatical form, the words quoted appear to me capable of including a future act. But, when we probe into their meaning, can we say with propriety that an act purports to be done in any parti-

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cular manner or capacity until it is actually done ? We can conceive an imaginary act and conceive it as done in some particular capacity. But can we properly speak of an act not yet done as an act purporting—that is, conveying to the outer world a pretence or profession—to be done in a particular capacity ? No doubt we could do so hypothetically. But, if the dry language of a statute speaks of an " act purporting so and so " without adding any word to indicate that the expression is intended to include not only acts done but also acts threatened, contemplated or intended, are we at liberty to interpret the expression as including an act not yet done ? If the words in question were " in respect of any act done by a public officer in his official capacity, " would there be any doubt that they did not include an act not yet done ? Does the insertion of the words " purporting to be " not only widen the character of the acts included but also add future acts to past acts? On the other hand it has been argued for the Official Receiver that, if the legislature had intended to require previous notice be given to a public officer only when a suit was to be brought in respect of a past act, it would have been a simple and easy matter to find a form of words which would have made that intention indisputably clear. There is some force in that argument. Without pursuing these questions and considerations further I think it may fairly be said that the phrase in question is susceptible of two interpretations, a wider interpretation including future acts and a narrower confined to past acts, and that at the least the narrower interpretation is as consonant with the wording of the section as the wider one. That being so, let us look at the consequences to which the wider interpretation leads. In practice almost all suits against public officers in respect of future acts will be suits for injunctions. Unless a suit for an injunction is to fail entirely of its purpose, it is often necessary that the plaintiff should obtain a temporary injunction pending the suit. Under our procedure a temporary injunction can be obtained only after a suit is instituted. If no suit can be instituted for an injunction against a public officer and no temporary injunction can be obtained against him until two months after notice of the suit has been given, the remedy of injunction against such an officer may often be illusory. Can we suppose that the legislature intended to deprive a private party of a remedy against a public officer which can be enforced against another private party or to expose a private party to the risk of irreparable damage at the hands of a public officer, though

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means are provided for guarding against such damage at the hands of another private party? Can we suppose that the legislature, having provided the Courts with the weapon of a temporary injunction for the protection of private rights, intended to tie the hands of the Courts for two months before that weapon may be used against a public officer? This last suggestion at least we cannot accept lightly. It is a well-established rule that, when a provision of a statute is susceptible of two interpretations and one of them leads to a manifest absurdity or to a clear risk of injustice and the other leads to no such consequences, the second interpretation must be adopted. In my opinion that rule may properly be applied in interpreting the words now in question. I may mention here that Mr. Krishnaswami Aiyar for the Official Receiver has pointed out that S. 80 clearly makes notice necessary for every suit against the Secretary of State, whether in respect of past or future acts, and has asked with some dialectical force whether it is reasonable so to interpret the section as to require notice with its attendant danger of irreparable damage to be given before the institution of a suit for an injunction against the Secretary of State but not before the institution of a suit for an injunction against a public officer. I see nothing really unreasonable in supposing that such a distinction was contemplated by the legislature. Even when a suit is to be brought against the Secretary of State for an injunction, if the protection of a temporary injunction is urgently necessary, the plaintiff can obtain the temporary injunction against the public officer whose immediate act is feared if the section allows him to institute a suit at once against that officer without notice. In practice the immediate protection of a temporary injunction need never be required against the Secretary of State. Finally in interpreting the words in question there is one other consideration of great importance. So far as it is concerned with suits against public officers S. 80, Civil Procedure Code, is a provision restricting the ordinary right of every man to come to the Civil Courts for relief. It is our duty to interpret such a provision with the utmost strictness, and we must be very sure that our interpretation does not take us one fraction of an inch, one iota, beyond the length to which the language of the provision clearly compels us to go. For these reasons, if the question were bare of authority, I should have no doubt that the correct interpretation of the words in question was the narrower one, viz., that "act" does not include here a future act,

If we turn to cases in which the words in question have been interpreted in this connection, we find that the prevailing view in the Bombay High Court is as shown by *Naginlal Chunilal* v. *The Official Assignee* (4) and *Bhagchand Dagdusa* v. *The Secretary of State for India* (7) that S. 80, Civil Procedure Code, does not make previous notice essential for the institution of a suit for an injunction against a public officer in respect of some threatened act. The only cases of the Calcutta High Court to which we have been referred, viz., *Shahebzadee Shahun Shah Begum* v. *Fergusson* (5) and *Ganoda Sundary Chaudhurani* v. *Nalini Ranjan Raha* (1) which both dealt with the corresponding section of the Code of 1882, show that according to the view of the learned Judges concerned previous notice is not required before the institution of a suit against a public officer for an injunction. Mr. Krishnaswami Aiyar for the Official Receiver relies on *The Superintending Engineer, II Circle, Bezwada* v. *Chituri Ramakrishna* (8), the only reported case of this Court in which the question whether S. 80, Civil Procedure Code, requires notice to be given before the institution of a suit against a public officer for an injunction appears to have arisen for decision. But in that case, though both the learned Judges found that the suit was bad for want of notice to the officer concerned, they did not explicitly interpret S. 80, as extending to suits against public officers in respect of threatened acts though that would obviously have been the simplest way to dispose of the case. On the contrary they appear to have based their decision on a finding that the suit was really one in respect of an act which the officer had completed already. Though with respect I do not wish to be understood to agree with the reasoning of the learned Judges in all the Bombay and Calcutta cases which I have mentioned, it will be seen that they support the view that "act" in S. 80, Civil Procedure Code, does not include a future act and that the decision in *The Superintending Engineer, II Circle, Bezwada* v. *Chituri Ramakrishna* (8) is not against that view.

I agree that this appeal should be allowed and that the suit should be remanded with costs to abide as proposed by my learned brother.

A. S. V. *Appeal allowed and suit remanded.*

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1. (1908) I L R 36 C 28.
4. (1912) I L R 37 B 243.
5 (1881) I L R 7 C 499.
7. (1923) I L R 48 B 87.
8. (1920) 39 M L J 151.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE ODGERS.

Karnam Poodi Muniswami Pillai ... *Appellant** (*Plaintiff*)

v.

The Secretary of State for India in Council represented by the Collector of Chittoor District and another ... *Respondents* (*Defts.*).

Muniswami Pillai *v.* The Secretary of State for India.

Limitation Act, Arts. 120, 124—*Applicability—Karnam of new group of villages formed on re-grouping—Appointment to office of—Suit for declaration of validity of—Limitation—Prayer in plaint for recovery of office—Madras Act (III of 1895), S.* 21—*Applicability—Claim to be appointed in first instance to any of village offices set forth in the Act.*

Plaintiff was appointed by the Revenue Divisional Officer in April, 1912, karnam of a new group of villages, the re-grouping of which took place earlier in 1912. He was no relation of one *G* who was formerly the karnam of one or more of the re-grouped villages. On 2nd September, 1912 the plaintiff's appointment was cancelled by the Collector, and on 27th December, 1912 *G* was appointed karnam of the re-grouped villages in question, and on 21st February, 1913 he took charge from the plaintiff of his office.

In a suit instituted by the plaintiff on 19th April, 1920, for a declaration that he was the legally appointed karnam of the new group of villages, *held*; that Art. 120 of the Limitation Act applied to the suit, and it was barred.

Held further that, even if the plaint prayed for the plaintiff being put in possession of the office of karnam, the suit would not be one under Art. 124 of the Limitation Act.

The suit office of karnam being an entirely new one, the fact that it will or may become hereditary in the hands of the holder if and when appointed will not make it an hereditary office within the meaning of the Explanation to Art. 124.

Second Appeal against the decree of the Court of the Subordinate Judge of Chittoor in A. S. No. 257 of 1921 (A.S. No. 95 of 1921 on the file of the District Court of Chittoor) preferred against the decree of the Court of the District Munsif of Tirupathi in O.S.No. 344 of 1920.

N. Chandrasekhara Aiyar for appellant.

The Government Pleader for respondents.

The Court delivered the following

JUDGMENT :—In this case the plaintiff is the appellant and he sued, as seen from the printed plaint, for a declaration that he is the legally appointed karnam of the Kilapathi group and for consequential reliefs. He was appointed by the Revenue Divisional Officer in April, 1912, Karnam of a new group of villages, the re-grouping of which took place earlier in 1912. He is admittedly no relation of one Guruswami Pillai who was in 1910 the karnam of one or more of the re-grouped villages. On the 2nd of September, 1912, the plaintiff's appointment was cancelled by higher authority and on the

*S A No. 1056 of 1923. 18th February, 1926.

Muniswami Pillai v. The Secretary of State for India.

27th of December, 1912, Guruswami Pillai was appointed karnam of the re-grouped villages in question and on the 21st of February, 1913, he took charge from the appellant of his office. From early in 1915 to February, 1917, the appellant was engaged in various proceedings before the Revenue authorities to establish his claim and the Board of Revenue finally dismissed his claim on the latter date. On the 19th of April, 1920, this suit was filed.

The question raised before me is one of limitation, *i. e.*, whether Art. 120 or Art. 124 applies. The cause of action is stated by the plaintiff himself to have arisen on the 2nd of September, 1912, when the Collector of Chittoor set aside the plaintiff's appointment as karnam. That, of course, was more than six years before the filing of the suit. The difficulty is caused in this way. The original plaint—and the plaint is printed—is nothing but a suit for a declaration, and, if so, the suit is clearly barred under Art. 120. The District Munsif, however, says that an application to amend the plaint was made and allowed on the 6th of November, 1920. The effect of the amendment is according to him that the plaint as amended asks that the plaintiff be put in possession of the office of karnam. Whether the amendment was actually made or not does not appear. On the materials before me—and I have searched the records sent up to this Court from the Lower Appellate Court—it would be sufficient to dismiss the appeal on the ground that it is merely a declaratory suit and therefore out of time. But a point has been taken that this is a suit for the possession of an hereditary office with reference to the terms of S. 15 of Act II of 1894 which reads as follows :—

"And new offices which shall be hereditary if any of the offices they replace were hereditary shall be created for the new village or villages."

Mr. Chandrasekhara Aiyar for the appellant alleges that in order to come within the ambit of Art. 124 it is not necessary for the plaintiff to put forward an hereditary claim to an hereditary office. As stated, the plaintiff here is admittedly not a descendant of any of the former holders of the office before the villages were re-grouped. He is thus seeking the office for the first time so to speak, not on the ground of heredity, and it is a grave question to my mind whether he is seeking possession of an hereditary office within the meaning of the Explanation to Art. 124. The Explanation is as follows:—

"An hereditary office is possessed when the profits thereof are usually received or (if there are no profits) when the duties thereof are usually performed."

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This clearly does not apply to the case of the plaintiff here. The office is entirely a new one. That it will or may become hereditary in the hands of the holder if and when appointed is undoubted under S. 15 of Act II of 1894, but I am not prepared to say that this, even if we assume the amendment to have been made, is a suit under Art. 124. I think therefore that the plaintiff must fail on both these grounds.

A further point has been raised as to the exact effect of S. 21 of Act III of 1895 read with S. 13 of the same Act. It may be, as I expressed in my judgment in *Alagiasundaram Pillai* v. *Midnapur Zemindari Co., Ltd.* (1) that S. 21 does not apply to any claim to be appointed in the first instance to any of the village offices set forth in the Act. In this I followed the judgment of Sadasiva Aiyar, J. in *Krishnaswami Naidu* v. *Akkulammal* (2). However it is not necessary to give any decision on this last point.

The second appeal must be dismissed with costs.

A. S. V. ——— *Appeal dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE ODGERS AND MR. JUSTICE MADHAVAN NAIR.

S. K. Venkatrama Aiyar ... *Appellant** (*Respondent*)

v.

A. Buran Sheriff and another ... *Respondents* (*Petitioners* 1 *and* 2).

Venkatrama Aiyar v. Buran Sheriff.

Provincial Insolvency Act, S. 9—Creditor—Right to present insolvency petition—Condition—Creditor at time of adjudication if necessary—S. 9 (b)—"Some certain future time"—Meaning—S. 25—Discretion under—Exercise of, in appeal.

To entitle a creditor to present an insolvency petition under S. 9 of the Provincial Insolvency Act it is enough if he is a creditor at the time the petition is filed. It is not necessary that he should be a creditor also at the time the order of adjudication is made.

Per Odgers, J.—Semble the expression "some certain future time" in S. 9 (*b*) of the Act means any time in the future which is capable of being ascertained.

The provisions of S. 25 of the Act are discretionary, and where the District Judge was not asked to exercise his discretion under that section, the same ought not to be exercised in appeal.

Appeal against the order of the District Court of South Arcot in I. P. No. 20 of 1923.

M. S. Venkatarama Aiyar, C. R. Rajagopalachariar and *R. Srinivasa Aiyar* for appellant.

K. S. Venkatarama Aiyar for respondents.

*A A O No. 306 of 1925. 20th August, 1926.

1. (1919) 54 I C 816. 2. (1919) M W N 29.

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Odgers, J.

The Court delivered the following

JUDGMENTS :—*Odgers, J.* :—This is an appeal against the order of the District Judge of South Arcot adjudicating the appellant an insolvent. The facts prior to this adjudication are a little complicated, and the arguments founded thereon have taken some time to hear. The petitioning creditors filed two suits against the debtor, O. S. No. 548 of 1922 for gunny bags and O. S. No. 583 of 1922 for some amounts due in a partnership business. There was moreover a suit O. S. No. 580 of 1922 by the insolvent against these creditors for accounts due on an alleged partnership between him and them. This suit on the 7th of November, 1922 was dismissed and the other suits by the creditors were decreed. In May, 1923 the insolvent made some alienations of his properties and deposited the amount due in O. S. No. 548 into Court and the Court-sale was set aside. On the 23rd May, 1923, a petition for adjudication was filed in the District Munsif's Court. In the meantime appeals had been filed in O. S. No. 583 and O. S. No. 580. On the 13th August, 1923 creditors petitioned the District Court to adjudicate the appellant an insolvent, and on the 1st December, 1923 a stay of the petition was obtained pending the disposal of the appeals. On the 14th April, 1924, the appeal in O. S. No. 548 was allowed and the stay was dismissed. The appellant was therefore in a position to ask for restitution of about Rs. 585 which he paid out in order to set aside the Court-sale. In O. S. No. 580, the appellant's suit, he obtained a preliminary decree for accounts and in O. S. No. 583 an amount of Rs. 1,059, was decreed against him (the appellant) but it was only to become payable on the passing of the final decree in O. S. No. 580 of 1922. This O. S. No. 580 has been to second appeal when it was decided against the appellant and is now awaiting final appeal under the Letters Patent. On the 17th September, 1924, the petition for adjudication was considered and the petitioners were held to be creditors and entitled to present the petition and two months afterwards the adjudication took place. The learned Judge has held that the petitioner has complied with the conditions precedent set out in S. 9 of the Act to enable him to present the insolvency petition. It is admitted that the large bulk of the debt alleged to be due to the creditors is the amount due under the decree in O. S. No. 583 of 1922, viz., Rs. 1,059 odd, the time for payment of which was postponed till the final decree was passed in O. S. No. 580 of 1922. The learned Judge held that the

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postponement had not the effect of divesting the petitioners' character as creditors and that they were creditors when the petition was filed and they are still creditors.

It is contended that it is not sufficient that these petitioners should be creditors at the time the petition was filed, but they must be creditors at the time the order of adjudication is passed. We do not find any provision to that effect in the Act although there is a note by Mr. Williams in his book that this obtains in the corresponding provision in the Bankruptcy Act. The question seems to me to be whether a creditor has fulfilled the three conditions precedent set out in paragraph 9 at the time he filed the insolvency petition, *viz.*, (to put it shortly) a debt of Rs. 500, a liquidated sum payable either immediately or at some certain future time, and an act of insolvency. With regard to the last requirement no question has arisen in this case. Certain acts of insolvency, namely, alienations of property have been *prima facie* found by the Judge to exist, and the adjudication is founded upon those, but as before stated, the objection before us is that the petitioning creditors were not clothed with the proper authority as required by the Act before filing the petition in the two other respects. We had a great deal of discussion as to whether this decree debt of Rs. 1,059 made payable on the passing of the final decree in O. S. No. 580 is a liquidated sum payable at some certain future time and some decisions were quoted before us, *Rangaswami Mudaliar* v. *Srinivasa Mudaliar* (1), *Juggomohun Ghose* v. *Manick Chund and Koisree Chund* (2) and *Page* v. *Newman* (3), to the effect that it must be some definite ascertained debt. Those decisions as pointed out by the learned vakil for the respondents all relate to the Interest Act where the words are "certain time" and there has been some discussion as to whether "some certain future time" is something different from "a certain time". Speaking for myself I am rather inclined to think that the expression "some certain future time" means any time in the future which is capable of being ascertained. But I do not propose to decide in this present proceeding what the exact meaning of "some certain future time" in S. 9 (*b*) means. The question then comes down to this, whether the aggregate amount of debts due to the creditors amounted to Rs. 500 at the date of the filing of the petition. That that is the crucial date is, I think, fairly clear on principle because the words in

1. (1910) 8 M L T 405. 2. (1859) 4 W R 8 (P C).
3. (1829) 109 E R 140.

S. 9 are that the creditors shall not be entitled to present an insolvency petition unless the three conditions set out are fulfilled, and further we find that S. 13 (2) sets out the particulars that are to be contained in every insolvency petition presented by a creditor or creditors, and in (*b*) " the amount and particulars of his or their pecuniary claim or claims against such debtor." That seems to refer to the date of the insolvency petition. There is no doubt that at the date of the insolvency petition the appellant was indebted to the respondents in a sum of at least Rs. 1,059. But it is contended that the order made on appeal, namely, that this amount should not be payable until the amount of the final decree in O. S. No. 580 is ascertained has the effect of referring back the date of the appellate decree to that of the original decree and that therefore we do not know whether Rs. 1,059 or nothing or less or more will in fact be found due to the petitioning creditors. That argument of course cuts both ways, because it has to be remembered that O. S. No. 580 is under Letters Patent Appeal and if it is to be held that an appeal is simply a continuation of all the previous proceedings then O. S. No. 580 is still going on. Then there is a further question as to the costs payable to the appellant. It was stated to us that two sums of Rs. 204 and Rs. 245 were due to the insolvent from the creditors which together with a sum of Rs. 585 due to him (as stated above) in restitution would amount to something over Rs. 1,000. The question is whether a Court is to go into this kind of thing when it examines whether or not a petitioning creditor has qualified himself, to present his petition. I think not. I think that the fact that the appellant admittedly owed Rs. 1,059 at the date of the petition is sufficient to qualify the petitioning creditors. The only other point raised was that under S. 25 the Court should have held that there were circumstances which rendered it improper to adjudicate this man an insolvent.

There seems to have been talk of a stay, hence this proviso in the decree as to the payment of Rs. 1,059 which has caused this trouble. But the provisions of S. 25 are discretionary and there is no evidence that the learned District Judge was asked to exercise this discretion under the section and I do not think it can be said that under those circumstances he ought to have exercised, nor am I prepared to do so on appeal. There may be good grounds why it is better in the interests of both parties that this man should be adjudicated an insolvent I do not know. But it seems to me that to exercise a discre-

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tion under S. 25 in appeal and to hold that there is other sufficient cause why no order should be made would be to ask us to do a thing that we ought not to do especially in the circumstances of this case.

As to the costs one set has been paid into the Official Receiver's hands and the other set is under stay. It therefore cannot be said that this whole amount is due or can it be immediately set off against Rs. 1,059.

I think therefore this Civil Miscellaneous Appeal must fail and be dismissed with costs.

Madhavan Nair, J.

Madhavan Nair, J. :—I agree and have nothing to add.

A. S. V. *Appeal dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE ODGERS.

M. Pazhaniandi ... *Appellant** (*Plaintiff*)

v.

T. Naku and others ... *Respondents* (*Defendants*).

Pazhaniandi v. Naku.

Civil Procedure Code, O. 41, R. 17—Appearance by plaintiff—Plaintiff present in Court—Application for adjournment by his vakil which is refused—No appearance by plaintiff in such case—Civil Procedure Code, O. 17, R. 3—Default of appearance by plaintiff—Dismissal of suit on merits in case of—Power of Court.

The fact that the plaintiff was personally present in Court when he had a vakil there who applied for an adjournment which was refused does not amount to an appearance by the plaintiff for the purposes of O. 41, R. 17, Civil Procedure Code.

The words "notwithstanding such default" in O. 17, R. 3, Civil Procedure Code, clearly imply that the Court is to proceed with the disposal of the suit in spite of the default upon such materials as are before it. If in the case of a plaintiff such materials fail to substantiate the claim, the suit will be dismissed for that reason and not for default.

Second Appeal against the decree of the Court of the Subordinate Judge of Ottapalam in A. S. No. 14 of 1922 preferred against the decree of the Court of the District Munsif of Alatur in O. S. No. 157 of 1921.

P. S. Narayanaswami Aiyar for appellant.

C. V. Mahadeva Aiyar for respondents.

The Court delivered the following

JUDGMENT :—The point taken in this appeal by Mr. Narayanaswami Aiyar is that the Subordinate Judge who upheld the decree of the District Munsif was wrong and that the procedure must be taken to have been under O. 9, namely, a dismissal for default on which an application for restoration could be made. There has been no argument on the merits

*S. A. No. 1088 of 1923. 23rd February, 1926.

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before me and I therefore adopt the finding of both the Lower Courts that the plaintiff in this case has been guilty of culpable negligence in not taking the steps necessary for the trial of his suit. Now much has been made of the fact that the plaintiff was personally present in Court when he had a vakil there who applied for an adjournment which was refused. This has rightly been construed not to be an appearance by the plaintiff for the purposes of O. 41, R.17, for which Second Appeal No. 1734 of 1922 is an authority. The judgment of the Subordinate Judge is undoubtedly a decision on the merits. He finds that the Lower Court was right in refusing the adjournment, that it was right in dismissing the suit as there was no evidence on the plaintiff's side to prove his case, that the materials on record did not permit of the granting to the plaintiff of any relief and that the appeal has to be dealt with upon the materials on record only.

In my view the case falls under O. 17, R. 3, as pointed out by me in *Visvanatha Asari* v. *Sami Asari* (1). It seems to me that in this view the question as to the appearance of the plaintiff is beside the mark. As pointed out by the learned authors of the Civil Procedure Code, Woodroffe and Matthew in their commentary on the section, the words "Notwithstanding such default" in the rule clearly imply that the Court is to proceed with the disposal of the suit in spite of the default upon such materials as are before it. If in the case of a plaintiff such materials fail to substantiate the claim, the suit will be dismissed for this reason and not for default. It therefore seems to me that the judgment of the Lower Appellate Court is perfectly right and the Second Appeal must be dismissed with costs.

A.S.V. *Second Appeal dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS

PRESENT :—MR. JUSTICE WALLACE AND MR. JUSTICE MADHAVAN NAIR.

C. M. Pedda Malla Reddi and another ... *Petitioners** *(Accused)*

Pedda Malla Reddi, *In re.*

Penal Code, S. 294 (a)—Goods—Immoveable property if included in—Lottery for immoveable goods if an offence under section.

*Cr R C No. 760 of 1925 (Cr. R. P. No. 628 of 1925). 8th September, 1926.

1. (1925) M W N 802

Pedda Malla Reddi, *In re.*

Held, that the publication of an advertisement of a Rs. 52,500 lottery, by which a ginning factory was to be raffled at Rs. 5 tickets was an offence within S. 294 (*a*) of the Penal Code.

"Goods" in the section is not confined to moveables, but includes immoveable property.

Petition under Ss. 435 and 439 of the Code of Criminal Procedure, 1898, praying the High Court to revise the judgment of the Court of Sessions of Cuddappah in Criminal Appeal No. 39 of 1925 preferred against the judgment of the Court of the First Class Deputy Magistrate of Jammalamadugu in C. C. No. 70 of 1925.

V. L. Ethiraj and *M. C. Sridharan* for petitioners.

The Public Prosecutor on behalf of the Crown.

The Court made the following

ORDER :—The chief question for decision in this case is whether the act of the appellants, viz., publishing an advertisement of a Rs. 52,500 lottery, by which a ginning factory was to be raffled at Rs. 5 tickets, is an offence within S. 294 (*a*) of the Indian Penal Code. The argument is that "goods" in the section applies only to moveables, and that if the Legislature had intended to include immoveable property, it would have said so in appropriate words. We are not able to accept this contention. The idea of the lottery was that the lucky winner should get the factory for less than its real value, viz., for the actual sum he paid for his tickets, which would undoubtedly be for his "benefit". The proposal therefore was to do something "for the benefit of any person". There seems no reason, short of complete oversight, why a lottery for moveable goods should be an offence and a lottery for immoveable goods not an offence. The general clause was evidently regarded as sufficient to cover the latter case. The Public Prosecutor has called out attention to the wording of the English Acts, still in force, 8 George I, Chap. II, S. 36 and 12 George II; Chap. XXVIII, S. 1 both of which enact that a lottery for "lands" is an offence. We think there is no substance in this contention.

The next argument is that there is no case proved against the 1st appellant. The Lower Courts have found as a fact that he took part in the publication, and we cannot say that there is no evidence on which they could do so. It is quite clear that the 1st appellant's name was throughout associated with the lottery. We reject this contention also.

It is finally urged that the sentence is heavy. We agree with this. All that was called for in the circumstances was a

Pedda Malla Reddi, *In re.*

vindication of the law. The lottery was not held and no one is the worse for the publication. We reduce the fine to a fine on each appellant of Rs. 100 (Rupees One hundred) each. The balance, if paid, should be refunded.

A.S. V. *Fine reduced.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE JACKSON.

Raju Achari ... *Petitioner** (*1st accused*)

Raju Achari, *In re.*

Criminal Procedure Code (Act V of 1898), S. 256 as amended by S. 72 of Act XVIII of 1923—Accused not represented by vakil and required forthwith to state whether he wished to cross-examine the prosecution witnesses—Magistrate not recording his reasons—Whether mere irregularity curable under S. 537—S. 256 whether applies to summary trials.

Where an accused is not represented by a vakil the Magistrate, if he asks the accused forthwith to state whether he wishes to cross-examine the prosecution witnesses, must record his reasons. If the Magistrate without recording his reasons asks the accused who is not represented by a vakil forthwith to state whether he wishes to cross-examine the prosecution witnesses, it is not a mere irregularity curable under S. 537 of the Criminal Procedure Code.

Mussammat Ghasiti* v. *The Crown, (1925) 6 Lah 554 and ***Phuman Singh*** v. ***The Crown,*** A I R 1925 Lah 339 dissented from.

Subramania Aiyar v. ***King-Emperor,*** (1901) I L R 25 Mad. 61: 11 M L J 233 (P C) referred to.

The provisions of S. 256 are applicable to summary trials. ***Umaji Krishnaji*** v. ***Emperor,*** A I R 1926 Bom 226 dissented from.

Petition under Ss. 435 and 439 of the Code of Criminal Procedure, 1898, and S. 107 of the Government of India Act praying the High Court to revise the conviction of and sentence passed upon the petitioners herein, on 12th March, 1926, by the Court of the Honorary Presidency Magistrates, Royapettah (Egmore) in C.C.No. 5099 of 1926.

S. Venkatraman for petitioner.

The Crown Prosecutor on behalf of the Crown.

The Court made the following

ORDER :—Petitioner has been convicted under Ss. 323, 114, Indian Penal Code, by the Honorary Presidency Magistrates, Royapettah, and seeks to set aside the conviction because the Magistrate asked him forthwith whether he wished to cross-examine the prosecution witnesses without recording his reasons under S. 256, Code of Criminal Procedure.

It was probably intended by the Code as originally framed that in warrant cases the Magistrate should examine the prosecution witnesses-in-chief, and, if necessary, frame a charge

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*Cr R C No. 305 of 1926 (Cr R P No. 269 of 1926). 14th September, 1926.

Raju Achari, *In re.*

without the intervention of the accused. At the next hearing, the accused could engage his vakil and cross-examine the prosecution witnesses. Accused persons, however, considered, probably not without reason, that by the time the case reached the charge if the Magistrate had only heard one side his opinion might be too firmly fixed to be shaken. They preferred therefore to cross-examine the prosecution witnesses at the outset. In such a case, a second cross-examination after the charge might often seem a waste of time, and Magistrates were disposed to call upon the accused to re-cross-examine immediately after they had framed the charge. The accused would protest that they were still entitled to the interval which would be allowed them if they had not chosen to cross-examine and when the Magistrate proved obdurate, dissension and a sense of injustice often supervened.

Therefore by S. 72, Act XVIII of 1923, S. 256 was amended by inserting after the words "to state" the words

"at the commencement of the next hearing of the case or, if the Magistrate for reasons to be recorded in writing so thinks fit, forthwith."

This appears to be a very sensible solution of the difficulty. The Magistrate still controls the procedure, but if his ruling runs counter to the wishes of the accused he must support it by reasons. Where the accused is represented by a vakil from the outset he may generally be asked under the section if he wishes to cross-examine forthwith, for the simple reason that the accused will not be prejudiced and it is convenient to arrange a date for the subsequent attendance of the prosecution witnesses before they disperse.

If, however, he is asked forthwith, with a view to recalling the witnesses forthwith, fuller reasons will be required, because it is usually convenient to the accused to have an interval in which to study the depositions already on record, and discover material for the cross-examination of the witnesses.

If an accused is not represented by a vakil, reason must be shown for not postponing the question to the next hearing by which time he can have consulted a vakil.

In the present case the accused was not represented by a vakil, was required forthwith to state if he wished to cross-examine and the Magistrate recorded no reasons.

It is argued on behalf of the Crown that this is an irregularity curable under S. 537 of the Code of Criminal Procedure. It is difficult to apply this section to the facts of a case of this nature, for when can it be said that no failure of justice has

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been occasioned by refusing an accused an opportunity to consult a legal adviser? Nor do I think it applicable in law.

Before it was amended, S. 256 was undoubtedly mandatory. If a Magistrate omitted altogether to ask the accused if he wished to cross-examine the prosecution witnesses, it could not be said to be a mere irregularity. And when the Legislature specially amplifies a mandatory section, there is in my opinion no rule of construction which will allow the Courts to treat it as directory. No doubt a contrary opinion is expressed but without argument, in *Mt. Ghasiti* v. *The Crown* (1) and I can only say that I respectfully differ. In *Phuman Singh* v. *The Crown* (2) Campbell, J., holds that a contravention of S. 256 is covered by S. 537, but notes the difficulty which I have mentioned above of holding as a matter of fact that accused has not been prejudiced. As regards the law in that case, I doubt if it can really be argued that because S. 535, Criminal Procedure Code, validates a conviction which is attacked merely because no charge has been framed, therefore S. 537 validates a trial in which S. 256 has been contravened. The safest guide in these questions is the well-known ruling of the Judicial Committee. Their Lordships are unable to regard the disobedience to an express provision as to a mode of trial as a mere irregularity, *Subramania Aiyar* v. *King-Emperor* (3).

In Bombay it has been held that S. 256 is not applicable to a summary trial [*Umaji Krishnaji* v. *Emperor* (4)] and again I must express dissent.It is argued that S. 262, which provides that the procedure of warrant cases shall apply to warrant cases summarily tried except where otherwise mentioned, does not make S. 256 applicable to summary trials, because S. 263 relieves the Magistrate of the necessity of framing a formal charge. S. 256 clearly implies that the Court has had a charge read. It is only then that the occasion arises under which the accused is required to state whether he wishes to cross-examine.

But there is no such clear implication in S. 256, which makes no reference at all to a charge, and only happens to come below S. 255 because in the natural order of things the indictment precedes the defence. Whether an accused is tried under Ch. XXI or Ch. XXII, and whatever form the

1. (1925) 6 Lah 554.
2. A I R 1925 Lah 559.
3. (1901) I L R 25 M 61: 11 M L J 233 (P C).
4. A I R 1926 Bom 226.

Raju Achari, *In re.*

charge may take he must be called upon to plead, and S. 256 which provides for the defence is applicable to either sort of trial. Madgavkar, J. (93 I. C. 160) holds that in a summary trial there can be no reason for re-cross-examination, but seems to overlook a case like the present case where the accused is put on his defence before he is represented by a vakil.

The petition is allowed and petitioner ordered to be re-tried by the Chief Presidency Magistrate, or any Magistrate having jurisdiction to whom he transfers the case.

The conviction and sentence are set aside and the fine, if paid, is to be refunded.

N. S. *Conviction set aside and re-trial ordered.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE CURGENVEN.

Misrikhan Khaleel ... *Appellant** (*Plaintiff*)

v.

The District Board, Kurnool, represented by the President, District Board, Kurnool ... *Respondent* (*Defendant*).

Misrikhan Khaleel v. President, Dt. Board, Kurnool.

Madras Local Boards Act of 1884, Ss. 89 (1), 33 (a)—Lease of toll-gates—Contract of, by President of District Board—Validity against Board—Contract without sanction of Board—Effect.

A contract of lease of toll-gates entered into by the President of a District Board without its sanction is not binding upon the District Board.

The Board's sanction to such a contract by the President is not, by reason of S. 89 (1) of the Local Boards Act, a mere formality.

The opening of a toll-gate is not an act necessary either for the safety of the public or for the service of the public within the meaning of S. 33 (a) of the Act.

Second Appeal against the decree of the Court of the Subordinate Judge of Kurnool in A. S. No. 26 of 1923 (A. S. No. 80 of 1922, District Court, Kurnool) preferred against the decree of the Court of the District Munsif of Kurnool in O. S. No. 825 of 1921.

B. Sitarama Rao for appellant.

S. Ranganatha Aiyar for respondent.

The Court delivered the following

JUDGMENT :—In 1921 tenders were invited for the contract of the Markapur toll-gate and the plaintiff's tender was accepted on the 28th March, 1921 by the President, District Board, subject to the Board's approval. In pursuance of this

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*S. A. No. 147 of 1924. 10th August, 1926.

Misrikhan Khaleel v. President, Dt. Board, Kurnool.

arrangement the plaintiff executed an agreement and deposited a sum of Rs. 100, whereupon he was authorised by the President to keep the toll-gate and make collections from the beginning of the year, 1st April. He continued to make collections for two or three days after which, owing to the non-co-operation movement, his work was interfered with and eventually on the 17th April proceedings of the District Board were passed refusing to accept the tender. The plaintiff accordingly sued the Board for damages for breach of contract.

The question is whether the agreement between the President and the plaintiff constituted a valid contract which was binding on the District Board. Two arguments have been used to support this position—one that the District Board's sanction was a mere formality and the other that the matter was an urgent one and therefore that under the Act the President had power to accept the contract. The first argument is clearly untenable, because under S.89(1) of the Local Boards Act (V of 1884) power to lease out toll-gates is reserved to the Board itself. This argument in fact has not been seriously pressed here. Turning to the second ground urged, under S. 33 (*a*) of the Act the President is empowered in cases of emergency and when the immediate execution of any work or the doing of any act is in his opinion necessary for the service or safety of the public to execute that work or do that act. There is hardly any doubt that the matter was one of urgency in this case as the President's acceptance was on 28th March, and, if the plaintiff was to open the gate on the 1st April, there was no sufficient time to obtain the District Board's sanction. The President himself in fact admits as P. W. 2 that it was a matter of urgency and that in anticipation of the Board's approval he allowed the plaintiff to enter on his duties. The question, however, remains whether such an act can be said to have been necessary for the service or safety of the public. There can be no question of the safety of the public being involved in the opening of a toll-gate nor, so far as I can see, is it an act which is necessary for the service of the public. In fact in order to make this out the appellant's pleader has to resort to the argument that if arrangements had not been made to collect the tolls, the road itself would have been closed to traffic. This, I think, is clearly incorrect. The Act gives the District Board a right to collect tolls but I can find no warrant in it for the position that it has authority to close a road if it does not suit it to make arrangements for

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so collecting the tolls. If there is no demand for tolls there is no obligation on the public to pay them and in fact the collection of tolls is purely a matter for the benefit of the District Board and does not in any way serve the public. The obvious intention of the section is that the President should have the power when an emergency arises to abate a nuisance or remove dangerous conditions and I do not think that it can be applied to circumstances such as the present. I conclude accordingly that the District Board was not bound by the President's act and that the plaintiff has therefore no cause of action against it. I dismiss the Second Appeal with costs.

A. S. V. *Second Appeal dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE JACKSON.

Samiullah Sahib and others ... *Petitioners** (*Accused* 1 *to* 9 *and* 11 *to* 20).

Samiullah Sahib, *In re.*

Criminal Procedure Code, S. 239—"Same transaction"—Test—Persons separately engaged in fishing in prohibited waters—Joint trial of, for offences under Ss. 379, 447, Penal Code—Legality.

Nineteen persons were tried together and fined under Ss. 379 and 447 of the Indian Penal Code for stealing fish in the course of the same transaction They were all separately engaged in fishing, and there was no evidence of prior consultation or of identity of purpose. The accused were merely several poachers gathered in the same place at the same time.

Held, that the accused ought not to have been tried together, that their joint trial was not a mere irregularity, and that their conviction must therefore be set aside.

Whenever the applicability of S. 239 of the Criminal Procedure Code is doubtful, it is far better that it should not be applied, and that the accused should be tried separately.

Petition under Ss. 435 and 439 of the Code of Criminal Procedure, 1898, praying the High Court to revise the judgment of the Court of the Sub-divisional Magistrate of Bandar in C. C. No. 9 of 1925.

V. L. Ethiraj and *K. Chathukutty Nambiar* for petitioners.

The Public Prosecutor on behalf of the Crown.

The Court made the following

ORDER :—The petitioners have been fined Rs. 15 under Ss. 379 and 447 of the Indian Penal Code for stealing fish in the course of the same transaction. They were all separately engaged in fishing and there is no evidence of common object

*Cr. R. C. No. 33 of 1926. 6th September, 1926.
(Cr R P No. 26 of 1926).

Samiullah Sahib *In re.*

or common intention, they were merely several poachers gathered in the same place at the same time. The question is whether under S. 239 (*a*), Code of Criminal Procedure, they can lawfully be tried together.

The Sub-divisional Magistrate has stated the difficulty in his third paragraph without solving it. Apparently the Prosecuting Inspector undertook to prove the common intention but he has not done so. Even if ten people go separately and steal grain from a granary there must be a presumption of common intention before they can be tried together. The accused certainly cannot be held responsible for the wording of the charge sheet.

It cannot be said that these nineteen accused were not prejudiced by being tried together, nor had the Magistrate jurisdiction to try them. It is not a mere irregularity. See *Mala Makalakati Subbadu* v. *Emperor* (1) which lays down the law more unequivocally than the head-note to the report would suggest.

My attention has been directed by the Public Prosecutor to *Emperor* v. *Rafi-uz-zaman Khan* (2) which traverses though not in terms the leading Madras case in *Choragudi Venkatadri* v. *Emperor* (3) where Abdur Rahim, J. has held that community of purpose is a necessary element if the transaction is to be regarded as the same. In the Allahabad case three persons gave three practically identical false statements describing how a man was killed. It was held that their joint trial was regular because " the act of each accused may be wholly independent of the act of the other and in that sense there may be no community whatever ; but there may still be community of purpose in the sense of identity of purpose and the acts committed in the same transaction. " And above we refer the phrase "identity of purpose" to the phrase "community of purpose". The latter phrase is ambiguous in that it may mean only " identity of purpose " or it may suggest that the purpose of each was not only the same but was known to the others or in other words "conspiracy". We do not consider "conspiracy " in any way a necessary element. Therefore it is held to be sufficient for the purposes of S. 239 if there has been identity of purpose exclusive of any idea of conspiracy and the ruling might run, " there may still be identity of purpose and then the acts will be acts committed in the same transac-

1. (1915) 28 M L J 381.
2. (1925) I L R 48 A 525.
3. (1910) I L R 33 M 502 : 20 M L J 220.

Samiullah Sahib, *In re.*

tion". There is no need to import the word "community" at all if it is only to mean identity.

The Public Prosecutor would argue from this that the present petitioners had an identical purpose, fishing in prohibited waters, and therefore they may be tried together.

But this is to confuse "identical" with "similar". The purpose of the fishermen was that each should catch fish; each was not interested in what others caught and the more remote consequence of their act, the wrongful loss to the owner, was no actual part of their purpose. But in the Allahabad case the purpose of the perjurers was to deceive the Judge; they were not severally composing fiction as if the perjury were an end in itself. With the fisherman the catch is the thing and not the consequence; with the perjurer the consequence and not the lie. The terms of the section itself offer the best solution of these problems.

Were the offences committed in the course of the same transaction; or, in other words, were the offenders putting through the same thing? *A, B* and *C* travel in the same train without tickets; the purpose of each is to be conveyed without paying; it is a similar purpose but not identical, because *A* does not intend that *B* and *C* shall escape paying and so with *B* or *C*. They cannot be jointly tried. *A, B* and *C* travel in compartments reserved for other communities, as a protest against the railway policy. There is no evidence that they have conspired, but if their purpose is to protest their purpose is identical. They are putting through the same thing and it is the same transaction. They can be tried jointly.

But this is not put forward as a general rule for solving the section. The only general rule is that whenever the applicability of S. 239 is doubtful, it is far better that it should not be applied and that accused should be tried separately.

It must be clearly understood that discussions with regard to particular circumstances neither add nor detract from the meaning of the statute. As Benson, J. observes in *Choragudi Venkatadri* v. *Emperor* (3) it is neither necessary nor advisable to attempt to define the expression "the same transaction" which the legislature has left undefined; but there is usually no great difficulty in deciding whether any particular case comes within the rule. In *Emperor* v. *Rafi-uz-zaman Khan* (2) the same emphasis is laid upon the circumstances of the case, and the Court ends by finding as a matter of fact that there

2. (1925) I L R 48 A 325.
3. (1910) I L R 33 M 502: 20 M L J 220

Samiullah Sahib, *In re.*

was conspiracy or prior consultation. Probably cases which can be tried together although there has been no prior consultation are rare. In the present case not only is there no evidence of prior consultation but there is no identity of purpose, and the trial must be held to have been irregular. The accused are acquitted and the fines ordered to be refunded. There seems no necessity to order a re-trial in such a petty matter because the proceedings themselves have been deterrent and their acquittal does not affect the question whether petitioners have a right to fish in these waters.

A. S. V. *Accused acquitted and fines refunded.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE RAMESAM AND MR. JUSTICE CURGENVEN.

Vaidyanatha Aiyar and others ... *Appellants** (*Defendants 9 and* 10)

v.

Yogambal Ammal and others ... *Respondents* (*Plaintiff and defendants Nos.* 1 *to* 8, 11 *and* 23).

Vaidyanatha Aiyar *v.* Yogambal Ammal.

Pensions Act, S. 4—Applicability—Grant of land free of revenue—Applicability to—Unenfranchised personal inam—Suit for partition of—Civil Courts—Jurisdiction—Inam Rules of 11th October, 1859—Rule 5, cl. (3)—Scope and effect—Alienation—Right to question—Government and others—Right of—Inam confirmed under R. 5, cl. (1)—Resumption by Government—Right of—Existence of lineal heirs of grantee—Effect.

S. 4 of the Pensions Act is inapplicable to the case of a grant of land free of revenue. It is confined in its operation to a grant of land revenue only.

In a suit brought by the widow of a deceased member of a Hindu family which had become divided in status previously for a partition by metes and bounds of her share in certain unenfranchised personal inams belonging to her husband's family and devised to her by his will, *held*, that the jurisdiction of the Civil Courts to entertain the suit was not ousted by anything in the Pensions Act.

The object of cl. (3) of R. 5 of the Inam Rules of 11th October, 1859, is to protect the interests of Government and the prohibition therein can only mean that, as against the Government, all alienations are inoperative, not that they are void. So long as Government do not step in to enforce their rights, whatever they are, by ignoring the alienation, it is not open to others to question a transaction which amounts to an alienation.

In the case of an inam confirmed under R. 5, cl. (1) of the Inam Rules of 11th October, 1859, so long as lineal heirs of the grantee remain, the Government has no right to resume and the property descends like ordinary property.

Appeal against the decree of the Court of the Subordinate Judge of Tanjore in O. S. No. 15 of 1920, dated 16th April, 1923 and 27th April, 1923.

*Appeal No. 351 of 1923. 6th August, 1926.

Vaidyanatha Aiyar v. Yogambal Ammal.

T. R. Ramachandra Aiyar, T. M. Krishnaswami Aiyar and *K. Sankara Sastri* for appellants.

The Advocate-General, M. S. Venkatarama Aiyar, S. Subramania Aiyar, T. M. Kasturi and *V. Balasundaram* for respondents.

The Court (Spencer and Ramesam, JJ.) delivered the following

Spencer, J.

JUDGMENTS :—*Spencer, J.* :—I agree. In *Rama* v. *Subba* (1) the underlying policy of Regulation IV of 1831, which was repealed by the Pensions Act (XXIII of 1871), is stated to have been to protect the reversionary interest of the Crown over grants of revenue. The Pensions Act consolidated the law on the subject of pensions and grants of revenue. In Ss. 4 to 6 it re-enacted the provisions of the Regulation which it had repealed with reference to unenfranchised inams. Thus the same policy was continued in the Act which is now in force. Government have in fact by various enactments constituted themselves the sole and final arbiters of all questions relating to the validity and sufficiency of grants of money or land revenue as well as those relating to the personality of the recipient and Government's own right to resume grants once given. Similarly by S. 58 of Madras Act II of 1864 they took away the power of Civil Courts to adjudicate as to rates of land revenue payable to Government. Seeing that the learned Judge who decided *Rama* v. *Subba* (1) expressly stated that the grant concerned in the suit that was before them was not a grant of the freehold in the soil, and seeing that the object of that suit was in effect to challenge the decision of the Government, who accepted the recommendation of the Board of Revenue and the Collector, as to the person who should be recognised as the representative of the grantee of the jaghir, I am of opinion that that case should not be treated as an authority against the maintainability of the present suit for partition of plaintiff's share in certain unenfranchised personal inams belonging to her husband's family and devised to her by his will.

In *Jeeyamba Bai* v. *Secretary of State for India* (2) the suit was brought by one of the Ranees of the Tanjore family against the Government itself to have it declared that Government had acted illegally in resuming a certain inam village. This decision clearly stated that the suit related to a grant of land revenue and land revenue only. In the suit

1. (1888) I L R 12 M 98. 2. (1912) 23 M L J 687.

out of which the present appeal arises, there is no question as to the grant of land revenue but only a question whether the plaintiff is entitled to a share in the freehold interest in certain unenfranchised personal inam lands. The jurisdiction of the Civil Courts to decide such a point is not ousted by anything in the Pensions Act. On the other point I have nothing to add to my learned brother's judgment. The appeal fails and is dismissed with costs of plaintiff. The appeal is also dismissed as against 11th defendant with costs proportionate as stated in my learned brother's judgment. The 11th defendant's memo. of objections is allowed but without costs. The other parties will bear their own costs.

Ramesam, J.

Ramesam, J. :—The 9th and 10th defendants are the appellants before us. The suit is for partition between the members of the family. The family had become divided in status long ago. The present suit is for division by metes and bounds. The plaintiff is the widow of one Muthuswami Aiyar who died in 1904 and claims under his will. The appeal relates to the subject-matter of the fourth issue, namely, items 1, 4, 6, 7 and 8 which are unenfranchised hereditary personal inams.

Two points have been raised for the appellants: (1) That the suit is not maintainable in a Civil Court under S. 4 of the Pensions Act, and (2) that the plaintiff has no right to a share in these items either as heir or as devisee.

Taking the first point, S. 4 of the Pensions Act enacts that no Civil Court shall entertain any suit relating to any pension or grant of money or land revenue conferred or made by the British or any former Government. Now, remembering that "an enactment of a character which deprives the subject of his right to resort to the ordinary Civil Courts of Justice for relief in certain cases ought to be construed strictly and the Court should not extend its operation further than the language of the Legislature requires" [*vide* the cases cited in *Balvant Ramchandra* v. *Secretary of State* (3)] one would think that the proper construction of the section would confine its operation to a grant of land revenue only as opposed to a grant of land. This is the view taken in this Court in *Panchanada* v. *Nilakanda* (4) where Turner, C. J. says:

"That Act contemplates money payments to be received through the Collector or recovered from persons bound to pay revenue."

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3. (1905) I L R 29 B 480 at 490.
4. (1885) I L R 7 M 191.

Vaidyanatha Aiyar v. Yogambal Ammal.

Ramesam, J.

and therefore the Act does not cover grants of lands revenue free.

This is also the view taken by Batty and Russell, JJ., in *Balvant Ramchandra* v. *Secretary of State* (3). They follow the decision in *Panchanada* v. *Nilakanda* (4). They also refer with approval to *KumaraTirumalai Naik* v. *Bangaru Tirumalai Sauri Naik* (5) where it is observed:

"It cannot be said that the giving of land free of revenue is a grant of land revenue."

Babaji Hari v. *Rajaram Ballal* (6) was quoted as authority. The passage cited runs thus :

"The land revenue arising from a man's own holding, when it is remitted, and the land pays nothing, is rather extinguished than granted."

I agree with these cases.

The appellant relies on two decisions, *Rama* v. *Subba* (1) and *Jeeyamba Bai* v. *Secretary of State for India* (2). It may be that in the former case it is possible to arrive at the conclusion that on a construction of the grant there is a distinct grant of the land revenue apart from the land though there was also a grant of the land. It may be that in such cases the Act applies but if anything more was intended to be laid down in *Rama* v. *Subba* (1) I am not able to agree with it especially as my view is in consonance with the trend of later decisions of this Court. The second decision relied on by the appellant, *Jeeyamba Bai* v. *Secretary of State for India* (2), was a decision of Benson and Sundara Aiyar, JJ. Sundara Aiyar, J. afterwards explained it in *Secretary of State* v. *Subbarayadu* (7) and it is authoritative only in the light of that explanation. In the later case it was observed :

"The plaintiffs alleged that the land itself was their *manyam* and this position was not contested by any of the defendants. The suit is therefore not one relating to any grant of land revenue."

Referring to *Jeeyamba Bai* v. *Secretary of State for India* (2) it was said :

"The instrument of grant, it was held, distinctly made a grant of the taxes due to the Government although it may have been that the *kudiwaram* also was granted. The grant of the *kudiwaram* and *melwaram* was regarded as distinct and several. The ratio of the decision was, that where the Court is able to hold that there is a distinct grant of the land revenue itself the suit relating to it is not within the cognizance of Civil Courts except with the sanction of the Collector."

1. (1888) I L R 12 M 98.
2. (1912) 23 M L J 687.
3. (1905) I L R 29 B 480.
4. (1883) I L R 7 M 191.
5. (1898) I L R 21 M 310 at 320.
6. (1875) I L R 1 B 75 at 81.
7. (1912) I L R 36 M 559: 23 M L J 728.

Vaidyanatha Aiyar v. Yogambal Ammal.

Ramesam, J.

I also agree that where there is a distinct grant of the land revenue even though the land is also granted the Act applies. But I am not to be taken as holding that the decision in *Rama* v. *Subba* (1) and *Jeeyamba Bai* v. *Secretary of State for India* (2) are correct as to the construction of the grants in those cases. That point does not arise in this case. All that I can now say is, if the construction of the grants in those cases is right, I agree with the principle of law applied. The position of the words "land revenue" next to the words "pension or grant of money," I think, also supports this view. There is only one other decision of this Court to which I shall refer; it is *Desayi* alias *Allam Raju Najundiah* v. *Desayi* alias *Allam Raju Venkatasubbiah* (8) where it was held that the Pensions Act does not apply to a claim among the members of the family for partition but I shall not commit myself to the preceding sentence "These observations are of great value in considering the right of an alienee to recover possession of an inam". The actual decision is that the Act did not apply. I therefore hold in this case that the Pensions Act is not a bar to the maintainability of the suit. I may add that the decision in *Panchanada* v. *Nilakanda*(4) arose in connection with this very family. *Venkatarama Aiyar* v. *Chandrasekara Aiyar* (9) is another decision relating to the same family. The last decision leads me to the second point.

Mr. Krishnaswami Aiyar argues for the appellant that under terms of the Inam Settlement(*vide* Ex. V which is the inam register), the land was confirmed under R. 5, cl. 3 of the Inam Rules of 11th October, 1859. But this was not agreed and it was ultimately confirmed under R. 5, cl. 1. Sub-cl. (1) of cl. 1 of R. 5 says that succession is limited to direct lineal heirs. As the widow cannot succeed as an heir, it is argued that the plaintiff cannot succeed as she claims under a will of her husband which is an alienation within the meaning of cl. 3. Now the object of cl. 3 is to protect the interests of Government and the prohibition therein can only mean that, as against the Government, all alienations are inoperative, not that they are void. So long as Government do not step in to enforce their rights, whatever they are, by ignoring the alienation, I do not think it is open to others to question a transaction which amounts to alienation. This is the view

1. (1888) I L R 12 M 98.
2. (1912) 23 M L J 687.
4. (1883) I L R 7 M 191.
8. (1914) 27 M L J 618.
9. (1921) I L R 44 M 632 : 40 M L J 344.

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Ramesam, J.

taken in *Venkatarama Aiyar* v. *Chandrasekhara Aiyar* (9), also in *Boyanapalli Venugopal Rao Garu* v. *Venkata Narasimha Rao* (10) and *Lakshmipathi* v. *Narasimham* (11). I agree with all these decisions. The appellant refers to *Subhan Ali* v. *Imami Begam* (12), but I do not think that case has any application here. I agree with the respondent's contention that so long as lineal heirs of the grantee remain the Government has no right to resume and the property descends like ordinary property. This is not a case in which a special rule of succession is laid down for each individual holder of his share of the inam. It may also be pointed out that from 1904 up to 1917 the plaintiff has been allowed by the other members of the family to be in possession of her husband's share by receipt of the corresponding income and the appellants before us themselves recognised her right. Ex. 14 is a lease taken by the 9th defendant in favour of himself, the plaintiff, and Jagadisa Aiyar, father of defendants 4 to 8. His explanation that the document so taken was all arranged by the 1st defendant, cannot be accepted. It appears from the registration endorsement that the document was delivered to the 9th defendant, though he does not now choose to produce the original and produces only the registration copy. The plaintiff having been recognised to be the owner of her husband's share for more than twelve years claiming under her husband's will, she has acquired title by prescription against the other sharers who also seem to be estopped from denying her title. The second point also fails.

The result is, the appeal is dismissed with costs of the plaintiff.

In the appeal, some grounds were taken against the 11th defendant's decree, but the appellant has not paid any Court-fee in respect of it and it is dismissed with proportionate costs of the 11th defendant, pleader's fees being calculated on the proportionate shares of the 11th defendant in the items 1, 4, 6, 7 and 8.

The 11th defendant has filed a memorandum of objections claiming profits subsequent to the institution of the suit. It is conceded by the appellants that he is entitled to it and the omission is probably the result of a slip. The memorandum of objections will be allowed but there will be no order as to costs. The other parties will pay their own costs.

9. (1921) I L R 44 M 632 : 40 M L J 344. 10. (1911) 2 M W N 384.
11. (1916) 3 L W 590. 12. (1925) I L R 52 C 971 at 977 (P C).

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This appeal having been posted to be spoken to this day, the Court (Ramesam and Curgenven, JJ.) delivered the following

JUDGMENT :—The mesne profits decreed in favour of plaintiff and 11th defendant will be ascertained by the Court below and a supplemental final decree will be passed. No part of the mesne profits is to be left to be determined in execution as was originally directed by the Court below.

A. S. V. *Appeal dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE JACKSON.

R. S. Naidu ... *Petitioner** (*Respondent*)

v.

J. Ramier ... *Respondent* (*Petitioner*).

R. S. Naidu v. J. Ramier.

Election petition—Inquiry on—Scope of—Points not raised in petition—Inquiry into—Jurisdiction—Election rules—Rules 1, 2; 6 *and* 11—*Election rules, Rule* 4 (*ii*)—*Drawing of lots—Provision for—Applicability of, to case where originally there were only two candidates.*

Under the rules for the decision of disputes as to the validity of an election, the Court to which an election petition is presented must confine its inquiry to the points raised in the election petition; and by not doing so, it acts without jurisdiction.

The drawing of lots provided for in Rule (4) (*ii*) of the Election Rules refers as much to an election when originally there were only two candidates as to one in which originally there were more candidates than two.

Petition under Ss. 115 of Act V of 1908 and 107 of the Government of India Act praying the High Court to revise the order of the Court of the Subordinate Judge of Madura, dated 24th April, 1926, in O. P. No. 27 of 1925.

T. R. Ramachandra Aiyar for petitioner.

T. M. Krishnaswami Aiyar, K. Rajah Aiyar, P. N. Appusami Aiyar and *V. Ramaswami Aiyar* for respondents.

The Court delivered the following

JUDGMENT :—The petitioner seeks to revise the order of the Subordinate Judge of Madura in O. P. No. 27 of 1925.

The petitioner and counter-petitioner were the two candidates for the office of Chairman in the Madura Municipal Council. Each obtained an equal number of votes, and lots were drawn to decide the successful candidate. The petitioner was declared elected, and the counter-petitioner presented an election petition before the Subordinate Judge questioning the validity of the election because, among other reasons, the lots had been drawn not by the presiding councillor

*C R P No. 469 of 1926. 28th July, 1926.

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himself as required by R. 4 (*ii*) of the Rules for conduct of the Election of Chairman but by a boy, an utter stranger. The learned Subordinate Judge, without considering this, or other objections contained in the petition, has declared the election void on the ground that under the rules in the particular circumstance of this case there should have been no drawing of lots at all. The petitioner seeks to revise this order, firstly, as being without jurisdiction, because the inquiry by the Subordinate Judge must, under the rules, be confined to the matters contained in the petition and, secondly, as being an incorrect interpretation of the Election Rules.

The Subordinate Judge being of opinion that the law was not clear upon the question whether he could raise pleas other than those embodied in the petition referred the matter to this Court, and was directed to dispose of it himself. Rule 1 of the Rules for the Decision of Disputes as to the Validity of an Election (*Fort St. George Gazette,* 30th November, 1920) lays down that no election. . . . shall be called in question except by an election petition presented in accordance with these rules. Such petition (R. 2) shall contain a statement in concise form of the material facts on which the petitioner relies; and shall (R. 6) be enquired into by the Judge as nearly as may be in accordance with the procedure applicable under the Code of Civil Procedure. If in the opinion of the Judge [R. (*ii*)] the result of the election has been materially affected by any non-compliance with the provisions of the rules the election of the returned candidate shall be void. Under O.7,R.(*ii*) the Court is obliged to reject a plaint if it does not contain a cause of action. Thus, if the present petition had merely stated that the election should be treated as void, and had left it to the Judge to discover the invalidating circumstance the Judge would have been bound to reject it *in limine* (cf. *Janardhanam* v. *Verghese* (1)).

Therefore it seems clear that by the statute law of this country the Judge is expected to confine his inquiry to the points raised in the election petition, in which circumstances little is to be gained by reference to British case-law. It may be noted, however, that when new points are discovered the British practice is to amend the petition and not merely to raise the matter in argument, and such amendment must be strictly within time. Rogers on Elections, page 275, *Maude v. Lowley* (2).

1. (1924) 48 M.L J 451. 2. (1874) L R 9 C. P. 165.

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The counter-petitioner urges *contra*, relying upon observations in *North-Western Salt Co., Ltd.* v. *Electrolytic Alkali Co., Ltd.* (3) that to raise a question of illegality it is not necessary that the defence of illegality should be pleaded. When it is apparent on the face of a contract that it is unlawful, it is the duty of the Judge himself to take the objection. . . . the defendants are not bound to plead that it is illegal because that is law not fact. These observations are concerned with the defence not with the plaint and cannot in my opinion be read as excusing the plaintiff from giving the defendant fair notice of what he intends to raise and the facts on which he relies as constituting the cause of action. Nor is there any precise analogy between a contract which on its face is unlawful, and an election procedure which perhaps is arguably irregular. I must hold that the learned Subordinate Judge by not confining himself to the matters raised in the petition has acted without jurisdiction.

In these circumstances it is not really necessary to consider whether the Lower Court's interpretation of the rules is or is not correct. But the point has a certain bearing upon the question whether the election upon its face was illegal.

Under R. 4 (*i*) if there are only two candidates the one who secures the larger number of votes shall be considered to have been elected. That is quite simple, but if there are more candidates than two, the next rule provides that by a process of elimination the number shall be brought to two. Thus (*ii*) the elimination shall be repeated until two candidates only are left, and the candidate who secures the larger number of votes shall be considered to have been elected. So it will be seen that the election with only two and the election with a multiplicity of candidates have by this system of elimination been brought into line. Then the rule proceeds: In the event of there being an equality of votes at the final stage between the two remaining candidates and be it noted when originally there were only two candidates there can be no further stage and no more remaining candidates—the Chairman or presiding officer shall draw lots. The Chairman and both the contesting candidates took the drawing of lots to refer to an election when originally there were only two candidates, and I am not prepared to hold that that interpretation is either unreasonable or incorrect. The interpretation of the Subordinate Judge leaves the election entirely in the air if there happen to be an equality of votes when only two candidates stand. It is not

3. (1913) 3 K B 422.

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therefore a question of deciding between two interpretations each of which makes sense; but of deciding between common sense and nonsense, and I see no sufficient ground for deliberately relegating the rule to the latter category. And the above discussion shows how very far this matter is removed from the question of a contract which on its face is illegal.

I allow the petition, reverse the order of the Lower Court, and direct it to dispose of the matters raised in the election petition according to law, in order to see if the result of the election has been materially affected by any non-compliance with the provision of the rules.

I observe it noted in the learned Subordinate Judge's previous reference to this Court that Government propose to amend R. 4 (*ii*), the drafting of which cannot be said to be entirely satisfactory.

There will be no costs in this petition.

A. S. V. *Petition allowed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE WALLACE AND MR. JUSTICE MADHAVAN NAIR.

P. Natesa Mudaliar ... *Appellant** (*Accused*).

P. Natesa Mudaliar, *In re.*

Madras City Municipal Act (IV of 1919), S. 288—Scope of—Proof that machinery is a nuisance, whether necessary—Interpretation of statute—Marginal note.

It is not necessary that the machinery must be proved to be a nuisance before any part of S. 288 of the Madras City Municipal Act comes into operation. The wording of the section is plain that the question whether the machinery is or is not a nuisance is one for the Commissioner alone. Whether it is a nuisance or not is immaterial; permission has to be obtained in either case. *Smith, In re,* (1925) 45 M L J 731 disapproved.

Reading of a section of a statute by referring to the marginal note is not a legitimate canon of interpretation. *Balraj Kumwar v. Jagapal Singh,*(1904) I L R 26 A 593 (P C) referred to.

Appeal against the order of the Court of the Presidency Magistrates, Georgetown, Madras, in Case No. 30993 of the Calendar for 1924.

P. Sankaranarayana for appellant.

The Crown Prosecutor on behalf of the Crown.

The Court delivered the following

JUDGMENT :—The appellant has been convicted of erecting without the permission of the Commissioner of the Madras Municipal Corporation machinery by the use of which smell,

*Cr Appeal No. 331 of 1926. 22nd September, 1926.

P. Natesa Mudaliar, *In re.*

noise, vibration, etc., are produced. This is an offence by virtue of Ss. 288 and 357 and Sch. VII of the Act. Admittedly he has put up an electric motor-driving mill and the evidence shows that this machinery emits disagreeable odours and produces considerable noise.

It is contended first that this is not machinery. This contention deserves no consideration.

Next, it is urged that the appellant had only substituted this motor for an oil engine for which he had taken out permission. But even so, it is obvious that he had erected this machinery.

Finally, it is urged that the machinery is not a nuisance. But that is no defence to the case. The wording of S. 288 is plain that the question whether the machinery is or is not a nuisance is one for the Commissioner alone, and if he finds that it is a nuisance he may refuse permission altogether. Whether it is a nuisance or not a nuisance is immaterial, permission has to be obtained in either case and may be withheld in the former case.

It is, however, brought to our notice that one learned Judge of this Court has in a ruling reported in *Smith, In re* (1) taken a different view, namely, that it must be proved that the machinery is a nuisance before any part of the section comes into operation. With all deference we are unable to agree with this view. To hold so would result in this, that the section empowers the Commissioner to grant a licence for what is a public nuisance and what he himself considers a public nuisance. The learned Judge was constrained to support his reading of the section by referring to the marginal note, but it has been frequently held that that is not a legitimate canon of interpretation—*see* the Privy Council case in *Balraj Kunwar* v. *Jagatpal Singh* (2). The section as it stands is to our minds perfectly plain; any one erecting machinery must get the permission of the Commissioner (whether permission is equivalent to *licence* is a matter which we need not consider in this case) and the Commissioner may refuse permission if the machinery in his opinion constitutes a nuisance to the neighbourhood. The section is a very salutary one in the interests of the general public. We can therefore see no reason to interfere and we dismiss this Appeal.

N. S. *Appeal dismissed.*

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1. (1925) 45 M L J 731. 2. (1904) I L R 26 A 393 at 406 (PC).

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE KRISHNAN AND MR. JUSTICE VENKATASUBBA RAO.

Subban Chettiar ... *Appellant** (*Plaintiff*)

v.

Rangan Chetti and others ... *Respondents** (*Defendants*).

Subban Chettiar *v.* Rangan Chetti.

Mortgage deed—Construction—Usufructuary mortgage for fixed period—Mortgagee prevented from taking possession by wrongful act of prior mortgagee—Period of his possession if can be extended by reason of—Remedy of mortgagee in such case.

The owner of a village mortgaged it with possession to *O* on 2nd April, 1899. The mortgagee was to enjoy the village for a period of 12 years ending on 30th June, 1911.

On 29th June, 1901 a second mortgage of the same village was given to defendants 1 and 2. That mortgage was also one with possession. The amount payable to *O* was reserved with defendants 1 and 2 to be paid to him when his mortgage became redeemable. The deed further provided that the mortgagees (defendants 1 and 2) were to enjoy the village for a period of 10 years after the expiry of the period fixed for *O*, and that the mortgage was redeemable on the 30th of Ani in any year, after the expiry of the said period of 10 years. Defendants 1 and 2 were therefore entitled to be in possession of the village from 30th June, 1911 to 30th June, 1921.

On 16th December, 1910 a third mortgage of the village was given to the plaintiff.

Defendants 1 and 2 did not redeem *O's* mortgage on 1st July, 1911; but the plaintiff did and got possession on 30th August, 1911. Defendants 1 and 2 deposited the amount of *O's* mortgage in Court under S. 83 of the Transfer of Property Act on 24th June, 1913, treating plaintiff as standing in the shoes of *O*. But the plaintiff declined to accept the sum and hand over possession. Thereupon defendants 1 and 2 obtained a decree for redemption and got possession of the village in execution on 21st September, 1914.

In a suit for redemption instituted by the plaintiff, as third mortgagee, in September, 1921, the question was whether, in calculating the period of 10 years during which the defendants 1 and 2 were entitled to be in possession under their mortgage, they were entitled to a deduction of the period between 24th June, 1913 and 21st September, 1914, during which the plaintiff had wrongfully kept them out of possession.

Held, reversing the Court below, that they were not so entitled.

The usufructuary mortgage in favour of defendants 1 and 2 was for a period fixed from June 1911 to June 1921, and to add any period to it would be to alter the contract between the parties, a thing which could not be done.

Semble: The defendants may have a remedy against the plaintiff by way of a suit for damages or mesne profits for the wrongful obstruction caused by him.

Appeal against the decree of the Subordinate Judge of Tanjore in O. S. No. 80 of 1921.

*Appeal No. 99 of 1923 27th August, 1926.

B. Sitarama Rao and *S. R. Muthuswami Aiyar* for appellant.

S. Muthia Mudaliar and *A. C. Sampath Aiyangar* for respondents.

The Court delivered the following

Krishnan, J.

JUDGMENT :—*Krishnan, J.* :—This is an appeal against the decree of the Subordinate Judge of Tanjore in O. S. No. 80 of 1921 on his file. The suit was for the redemption of a mortgage in favour of the defendants. The Subordinate Judge dismissed the suit as premature and the plaintiff is the appellant before us. It would seem that the owner of the plaint properties, one Zamindar of Neduvasal, mortgaged the property first to one Oppillamani Chetti and others for a sum of Rs. 11,000. Under that document Oppillamani Chetti was to enjoy the property for a period of 12 years and he was redeemable in the year 1911, 30th June. In June, 1901 the same Zamindar gave a second mortgage to defendants 1 and 2. The covenant with them was that they should redeem the first mortgagee after its period was over and take possession of the property and enjoy it for a period of 10 years from the 30th June 1911, till 30th June, 1921. The Zamindar again gave a third mortgage of the same property to the plaintiff before us on 16th December, 1910 for a large sum of money. The plaintiff finding that the defendants did not redeem Oppillamani on the due date himself redeemed Oppillamani and got possession of the properties into his hands on the 30th of August, 1911. Subsequently the defendants tendered the amount due under the first mortgage to the plaintiff as they were entitled to do treating him as one standing in the shoes of the first mortgagee on the 24th June, 1913. The plaintiff declined to receive the money and be redeemed and declined to give possession of the mortgaged property to the defendants. Thereupon the defendants had the money paid into Court under S. 83 of the Transfer of Property Act and subsequently brought a suit for redemption. Although the plaintiff raised some objections to that suit a decree for redemption was passed against him. Finally, the property was redeemed from his possession on the 21st September, 1914, on which day the defendants seem to have got possession.

Now the present suit is by the plaintiff as the third mortgagee to redeem the defendants' second mortgage evidenced by Ex. B. The contention that has prevailed against the plaintiff is that his suit is premature. The way in which the

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Subordinate Judge has held that his suit is premature is that as it was on account of his obstruction that the defendants were not able to get possession from the period when they tendered the money to him up to the period when they actually got possession under the suit he was bound to make good that period to the defendants and if you add that to the period of 10 years fixed under the document the time for redemption would come only in August, 1922. He therefore dismissed the suit as premature saying that—

> "as the plaintiff wrongfully persisted in keeping possession himself and in excluding defendants Nos. 1 and 2 thereby securing to himself an undue advantage at the expense of his opponents.......... I do not think the plaintiff can be permitted to claim the benefit of his own wrongful act to the prejudice of the defendants."

That is how he has put the argument ; this seems to me to be a wrong view of the matter altogether. Here we have a usufructuary mortgage given to the defendants by the mortgagor for a period fixed from June, 1911 to June, 1921. If any further period is added on to it that will be altering the contract between the parties, a thing which seems to me cannot be done. It will be clear that the mortgagor himself would be entitled to redeem the defendants after the 10th June, 1911, when the defendants would have no answer to his claim. The question then is whether because the plaintiff in this suit was responsible for keeping out the defendants 1 and 2 for some time from possession, that period should be added to the period given to the defendants. Now a somewhat similar case arose in Madras in *The Zamindar of Vizianagram* v. *Behara Suryanarayana Pantulu* (1) where the defendant had leased to the plaintiff certain villages for a term of 7 years and 8 months. Within a month after the lease was given the plaintiff pleaded to be put in possession of the villages but he never obtained possession. After the period of 7 years and 8 months expired from the date of the lease the plaintiff brought a suit for possession and put forward the argument that as possession had not been given to him and as it was due to the default of the landlord who was in possession he was entitled to claim the period of 7 years and 8 months from the date on which he got possession. That argument was repelled by the Court. The learned Judge pointed out that that would be converting the lease of 7 years and 8 months ending in June, 1911 into one for a period ending in February, 1906. Similarly here if we are to accept the argument of the

1. (1901) I L R 25 M 587 : 12 M L J 249.

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Krishnan, J.

defendants it would be converting a usufructuary mortgage ending in June, 1921 to one that would be extended to August, 1922. It seems to me that that should not be done. If the defendants have suffered by not getting possession of the mortgaged property on account of the improper obstruction of the plaintiff at any time, their remedy is clearly by claiming damages or mesne profits for that period against him but they are not entitled to have their period of possession extended on that ground. A similar position arose also in an unreported case in S. A. No. 218 of 1896. The Subordinate Judge has relied upon a Bombay case *Hillaya Subbaya* v. *Narayanappa Timmaya* (2). That case does not seem to have any bearing on the present case at all. That was a case of estoppel as between a mortgagor and mortgagee which was extended to a person who had slipped into possession of the mortgaged property by colluding with the mortgagor. He had himself a title as reversion but he was held estopped from putting forward such reversionary right till he gave up possession as he obtained possession of the property by colluding with the mortgagor. That case does not seem to have any bearing on the present case at all.

In the view I am taking it must be held that this suit is within time and that the Subordinate Judge's decree must be set aside and the suit remanded to the Lower Court for disposal according to law. The cost of this appeal will abide and follow the result. The Court-fee will be refunded.

Venkatasubba Rao, J.

Venkatasubba Rao, J. :—The facts are complicated and I shall briefly set them forth.

The Zamindar of Neduvasal is the Mirasdar of the village in question. On the 2nd of April, 1899, he executed a usufructuary mortgage deed in respect of the village (Ex. A) to one Oppillamani Chetti to secure repayment of Rs. 11,000. The mortgagee was to enjoy the property for a period of 12 years ending on the 30th June, 1911. The property could not be redeemed before the expiry of the said term. The date fixed for redemption was the 1st of July, 1911. If it was not redeemed on that date, it was redeemable on the corresponding date of any subsequent year.

The next transaction is a transaction of the 29th of June, 1901. The Zamindar executed a second usufructuary mortgage (Ex. B) over the same property in favour of defendants 1 and 2 and their brother Veerappan Chetti. The con-

2 (1911) I L R 36 B 185.

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sideration for this was Rs. 14,000. Out of this Rs. 3,000 was paid in cash to the mortgagor and the balance, namely, Rs. 11,000 was reserved with the mortgagees to be paid to Oppillamani Chetti when his mortgage became redeemable. The bond contains the following clause :—

"You are to enjoy the properties for a period of 10 years after the expiry of the period fixed for Oppillamani and others. After the expiry of the period fixed for you in this document, we shall redeem the *otti* after paying the principal amount on the 30th of Ani in any year."

On the 16th December, 1910, the plaintiff obtained from the Zamindar two usufructuary mortgages, Exs. C and C-1 over the village in question, and certain other villages. These two together may be taken as constituting the third mortgage for the purposes of this appeal.

The second mortgagees (mortgagees under Ex. B) failed to redeem the first mortgage on the 1st of July, 1911. The plaintiff, however, paid up the Rs. 11,000 due to Oppillamani Chetti and redeemed his mortgage (Ex. A) on the 30th August, 1911.

Defendants 1 and 2 acquired the interest of Veerappan Chetti in February, 1913 and tendered Rs. 11,000 to the plaintiff. The latter refused to accept the sum and deliver up possession of the village to defendants 1 and 2. Thereupon these defendants deposited the amount in Court under S. 83 of the Transfer of Property Act on the 24th of June, 1913. The plaintiff even then refused to receive the sum. Defendants 1 and 2 then instituted on the 7th of July, 1913, a suit against the plaintiff for enforcing their right under Ex. B, obtained a decree and in execution thereof took possession of the village through Court on the 21st of September, 1914.

Defendants 1 and 2 assigned their right under Ex. B to defendants 3 to 5. The plaintiff sought to redeem the mortgage evidenced by Ex. B and proceedings taken in July, 1921, under S. 83 having proved to be of no avail, he instituted the present suit in September, 1921.

The defendants put forward in the Lower Court two contentions : (1) That they are entitled to be in possession of the property for a period of ten years commencing from the 21st of September, 1914. The learned Judge has not expressed any definite opinion on this point, as he has upheld the second contention of the defendants, to which I shall presently refer. This contention, however, cannot possibly be upheld as it is opposed to the terms of Ex. B which clearly provides that the ten years shall be computed from 1st July, 1911,

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the date when the mortgage under Ex. A became redeemable. There was nothing to prevent defendants 1 and 2 from redeeming Ex. A and taking possession of the property on the 1st of July, 1911. The delay in redeeming was due to their own fault and they cannot be heard to say that the ten years should be computed from the date of the actual redemption. (2) Their second contention, however, sounds more plausible. They claim that they are entitled in computing the ten years, to exclude the period between the 24th of June, 1913 and the 21st of September, 1914. This contention has been upheld by the Subordinate Judge and the suit for redemption has been dismissed on the ground that it was premature.

The learned Judge in arriving at this decision seems to have been influenced by considerations of equity. His view may be thus expressed. By reason of plaintiff's conduct the defendants were deprived of possession from the 24th of June, 1913 to the 21st of September, 1914. In some manner the plaintiff should be made accountable for this. The plaintiff having been in wrongful possession for about 15 months the defendants may be permitted to add on that period to their own possession. This shortly stated, is the view of the learned Judge.

Now, however wrongful the conduct of the plaintiff may have been, there is nothing in law which stands in his way of redeeming the property on the expiry of the term mentioned in Ex. B. The clause reads thus:

"After the expiry of the period fixed for you (defendants Nos. 1 and 2) in this document, we (the Zamindar) shall redeem the *otti* after paying the principal amount on the 30th of Ani in any year."

The period fixed expired on the 1st of July, 1921 and the suit was filed in September, 1921. The suit was not therefore premature. The learned Judge moreover overlooked another point. After plaintiff redeemed Ex. A, when he resisted the attempts of defendants 1 and 2 to obtain possession, he was acting in his capacity of the first mortgagee. In the present suit, in seeking to redeem the property, he asserts the right which he possesses as the third mortgagee. That these two rights exist in one and the same individual the plaintiff, is but a mere accident. To remove the confusion which has crept into the case, let us suppose that Oppillamani's mortgage had never been redeemed by the plaintiff and that the person whose conduct prejudiced defendants 1 and 2 was Oppillamani himself. In that case could the defendants have resisted the

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Venkata subba Rao, J.

plaintiff's suit on the ground that they were kept out of possession by Oppillamani for some time? Again let us suppose that the present suit had been instituted not by the plaintiff but by the mortgagor, the Zamindar. In that case, could the defendants have successfully raised the plea that the mortgagor should be penalised for the wrong committed by the present plaintiff and that his action should be dismissed as being premature?

In the previous proceedings, the plaintiff's position was that of the mortgagee; in the present suit, his position is that of the mortgagor. Whatever other remedies the defendants may have against the plaintiff for his wrongful conduct (say recovery of mesne profits or damages), there can be no defence to his present suit for redemption.

The appeal must be allowed and I agree in the order made by my learned brother.

A. S. V. *Appeal allowed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE DEVADOSS AND MR. JUSTICE SUNDARAM CHETTY.

Alamuri Punniah ... *Appellant** (*2nd respondent*)

v.

Sagarajee Kasarmal Firm Tenal and others ... *Respondents* (*Petitioners*).

Alamuri Punniah v. Sagarajee Kasarmal Firm Tenal.

Provincial Insolvency Act—Insolvency—Creditor's petition—Partners liable to a creditor under joint debt—Adjudication of, as insolvents—Single petition by creditor—Maintainability—Test.

Where two partners are liable to a creditor under a joint debt and each of them is alleged to have committed acts of bankruptcy, during the continuance of the joint debt by making certain alienations with a view to defraud or defeat the creditors of the firm, or with the object of giving a fraudulent preference, a single petition for adjudging both of them as insolvents cannot be deemed to be unsustainable merely because they have not committed a joint act of insolvency. The test is, whether, if the application were treated as a suit, the suit would be bad for multifariousness.

Appeal against the order dated 3rd April, 1924 of the District Court of Guntur in I. P. No. 43 of 1923.

B. Satyanarayana for appellant.

B. Somayya for respondents.

The Court delivered the following

JUDGMENT :—This appeal arises out of a petition filed by a creditor to adjudge respondents 1 and 2 insolvents. The 2nd respondent is the son-in-law of the 1st respondent.

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*A A O No. 317 of 1924. 22nd September, 1926.

Alamuri Punniah v. Sagarajee Kasarmal Firm Tenal.

The main contention put forward on behalf of the appellant here (who was the 2nd respondent in the Lower Court) is that a single petition for adjudicating both the respondents as insolvents is bad for misjoinder, and therefore unsustainable. There is no doubt that they are liable to the petitioner for a joint debt. The learned District Judge has also found upon the evidence on record that they are also partners. That finding has been challenged before us but we are satisfied that the inference drawn by the learned Judge is on the whole correct. Each link in the chain of circumstances adverted to by him may be inconclusive by itself, but the cumulative effect of all the links justifies his conclusion. We are not prepared to differ from him on this point. It is, however, contended by Mr. Satyanarayana that a single petition against both the respondents is unsustainable, unless it is shown that they are guilty of a joint act or acts of insolvency. The observations on page 186 in Williams on Bankruptcy Practice (13th Ed.) are pertinent to the present case:—

"In order to sustain a joint petition against two or more persons, it is necessary that some acts of bankruptcy shall have been committed by each of them. This may be a joint act of bankruptcy; but it is not requisite that they should have committed a joint act of bankruptcy or that they should all have committed an act of bankruptcy of the same kind; and in order to support a joint petition against all the members of the firm, the acts of bankruptcy must have been committed during the continuance of a joint debt and the petition must be founded on a joint debt."

We are of opinion that where two partners are liable to a creditor under a joint debt and each of them is alleged to have committed acts of bankruptcy, during the continuance of the joint debt by making certain alienations with a view to defraud or defeat the creditors of the firm or with the object of giving a fraudulent preference, a single petition for adjudging both of them as insolvents cannot be deemed to be unsustainable merely because they have not committed a joint act of insolvency. The test is, whether if the application were treated as a suit the suit would be bad for multifariousness, as was held in *Mamayya* v. *K. R. Rice Mill Co.* (1). In that case, the members of a joint Hindu family were sought to be adjudged insolvents. It seems to us that that decision does not go to the length of laying down that, if the acts of insolvency are not joint but separate, a single petition would not lie, though it would not be bad for multifariousness, when treated as a suit. If the act of insolvency committed by each partner would be one of the circumstances affording a cause of action

1. (1921) I L R 44 M 810: 40 M L J 570.

Alamuri Punniah v. Sagarajee Kasarmal Firm Tenal.

against him, it has still to be shown that the two causes of action cannot be made the subject of trial on a single application as it would amount to a misjoinder. We are unable to find such inconvenience as would make it obligatory on the Court to ask the petitioner to confine his case to one of the respondents by way of election. We hold that there is no legal bar to the maintainability of a single petition against both the joint debtors who are also partners in this case.

As for the question whether the 2nd respondent is shown to have committed an act or acts of insolvency, we cannot say that the learned Judge is wrong in his inference. The alienations effected by the 2nd respondent are mortgages under Exs. C and C-1, one of which was in favour of his own wife's sister's husband. There is a cloud of suspicion hanging over these transactions which would come under cls. (*b*) and (*c*) of S. 6 of the Act. We hold that the order of the District Judge is correct and dismiss this appeal with costs.

The respondent is entitled to his costs in the Lower Court. We allow the memorandum of objections. The respondent will add the amount of his costs to the amount already due to him.

A. S. V. *Appeal dismissed and Memo. of Objections allowed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE DEVADOSS AND MR. JUSTICE SUNDARAM CHETTY.

Thoyammal and another ... *Petitioners** (*Defendants*)

v.

K. A. Rathnavelu Nadar ... *Respondent* (*Plaintiff*).

Thoyammal v. Rathnavelu Nadar.

Madras City Tenants Protection Act (III of 1922), S. 9—Service of summons, whether means personal service.

The expression "service of summons" in S. 9 of the Madras City Tenants Protection Act means that the service should be personal service.

Petition under Ss. 115 of Act V of 1908 and 107 of the Government of India Act praying the High Court to revise the order of the Court of Small Causes, Madras, in Full Bench Application No. 24 of 1926 preferred against the order of the Second Judge of the Court of Small Causes, Madras, in E.S. No. 469 of 1925.

C. S. Nageswara Aiyar for petitioners.

R. Thirumala Thathachariar for respondent.

*C R P No. 239 of 1926. 8th September, 1926.

Thoyammal v. Rathnavelu Nadar.

The Court delivered the following

JUDGMENT :—This is an application to revise the order of the Second Judge of the Court of Small Causes, Madras, dismissing an application of the petitioners under S. 9 of the Madras City Tenants Protection Act (III of 1922). The petitioners are tenants. The respondent filed an ejectment suit and the summonses in the suit were fixed to the houses of the petitioners as it was said that they had gone out. This was on 21st December, 1925. The petitioners filed their application under S. 9 on 6th January, 1926. On objection by the respondent the application was dismissed as being out of time, for under S. 9 the application has to be made within 15 days after the service of summonses. It is contended before us that the learned Judge did not record a finding that the service was good and that he did not take evidence as regards the allegations of the petitioners that they were not aware of the affixture of the summonses to the door of their houses and that they came to know of the filing of the suit only on 2nd January, 1926. The learned Judge would have done well to have made a thorough enquiry into the allegations of the petitioners and satisfied himself that they were served before declaring the service to be good. But we do not propose to interfere with his order on this ground.

Under S. 9 of the Act the service should be personal service. The relevant portion of the section is "within 15 days after the service on him of summons apply to the Court," etc. The expression "service on him of summons" we think means that the service should be personal service. No doubt in the case of summonses under the Civil Procedure Code and under the Presidency Small Cause Courts Act the service need not be personal. But taking into consideration the nature and the scope of Act III of 1922 and the fact that the defendant will have no opportunity of applying under S. 9 if he does not make an application within 15 days, we think that the expression "service on him of summons" can only mean personal service. No doubt we are aware of the difficulties that the plaintiff or any other landlord may encounter on account of the avoidance of service by the tenants, but that would be no ground for not giving the words of S. 9 the plain meaning that they are capable of bearing. If the legislature wanted the service only to be good service, then the wording should have been "after due service" or "after proper service on him of the summons." In this view of S. 9 of the Act we hold that the petitioners were not served with summonses in the suit and

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therefore their application of 6th January, 1926 was not out of time. We set aside the order of the learned Judge and direct him to restore the application to file and deal with it according to law.

The petitioners are entitled to the costs of this application. The costs of the suit will be provided for in the decree that may be passed by the Judge.

N. S. *Order set aside and application remanded to the Lower Court.*

[FULL BENCH.]

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

(Ordinary Original Civil Jurisdiction.)

PRESENT :—SIR MURRAY COUTTS TROTTER, *Kt.*, *Chief Justice*, MR. JUSTICE KRISHNAN AND MR. JUSTICE BEASLEY.

Rajah Inuganti Venkatarayanim Varu *alias* Venkataramayya Garu ... *Plaintiff**

v.

W. H. Nurse ... *Defendant.*

F. B. — Venkataramayya Garu v. W. H. Nurse.

High Court—Original Side—Negotiable instrument—Suit on—Summary procedure—Ordinary form—Option as to—Order 6 (a) of Original Side Rules—Effect—Rule 63 (a) of O. 6 (a)—If ultra vires*—Suit by or against legal representative of party—If must also be in summary manner—Leave to defend in suit brought against legal representative of party—Grant of—Principles.*

Under O. 6 (*a*) of the High Court Rules of Practice a person suing on a negotiable instrument has no option to bring his suit in the ordinary form or under the summary procedure as he likes. That Order makes a rigid rule requiring all suits on negotiable instruments to be brought in a summary manner.

Rule 63 (*a*) of O. 6 (*a*) is not *ultra vires*. The rule enacted thereby is purely one of procedure and does not affect substantive rights of parties.

A suit by or against the legal representative of a party to a negotiable instrument and not by or against a party himself must, under O. 6 (*a*), also be brought as a summary suit, being still a suit on the instrument within the meaning thereof.

If any other cause of action is added not based on the instrument, the suit may fall outside the scope of the order.

The rule as to granting leave to defendants will, in an action brought against the legal representative of a party, be liberally interpreted.

Case referred to a Full Bench in C. S. No. 720 of 1925, Original Side, at the instance of Srinivasa Aiyangar, J.

N. Chandrasekara Aiyar for plaintiff.

K. S. Narayana Aiyangar and *G. Ramakrishna Aiyar* amicus curiæ.

*C. S. No. 720 of 1925. 20th October, 1925.

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The Court delivered the following

JUDGMENT :—This reference has been necessitated by the judgment of Devadoss, J., in C. S. No. 877 of 1923 sitting on the Original Side of the High Court wherein the learned Judge held that under O. 6 (*a*) of the High Court Rules of Practice a person suing on a negotiable instrument had an option to bring his suit in the ordinary form or under the summary procedure as he liked, the rules in the order, though in form peremptory, being in reality only directory and not mandatory; and that a suit by or against the legal representative of a party to a negotiable instrument and not by or against a party himself should be brought as an ordinary suit and not as a summary suit.

On both the above points it seems to us with all respect that the learned Judge's views cannot be supported. R. 62 of O. 6 (*a*) says that the

> "procedure prescribed by O. 37 of the First Schedule of the Code of Civil Procedure, 1908, shall be followed in all suits on negotiable instruments with the modifications mentioned in this order."

O. 37, Civil Procedure Code, no doubt gives an option to bring such a suit either in the summary form or in the ordinary form; for R. 2 (1) thereof says:

> "All suits upon bills of exchange, hundis or promissory notes may, in case the plaintiff desires to proceed hereunder, be instituted, etc."

Now it is in this very rule that O. 6 (*a*) has introduced a modification; for R. 63 (*a*) thereof which corresponds to it has deleted the words "may, in case the plaintiff desires to proceed hereunder," which are the words giving the option and has substituted for them the word "shall". There can be no clearer indication than that of the object of the framers of the rules to take away the option and substitute for it a rigid rule requiring all suits on negotiable instruments to be brought in a summary manner. The form prescribed for the plaint under the rule, namely, Form No. 4 in Appendix B, Civil Procedure Code, is a form adapted only for summary suits and not for ordinary suits. The intention underlying the High Court's rule was to expedite the disposal of all suits on negotiable instruments and the rule has had a salutary effect in that direction. The very object of the rule will be defeated if we are to hold that in spite of its language there is still an option left to a plaintiff suing on a negotiable instrument to bring his suit in the ordinary form. We hold there is no such option.

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In this connection it may be mentioned that it was feebly suggested that on the view we are taking, the rule would have to be treated as *ultra vires* because it is said that it takes away the ordinary right of suit from a litigant suing upon a negotiable instrument. That may be the effect of the rule but the High Court which framed the rule has full powers to frame rules for regulating its procedure under clause 37 of the Letters Patent under which this rule was framed; and the rule is purely one of procedure and does not affect any substantive rights of parties. This objection is therefore groundless.

The last question is whether suits on negotiable instruments brought not by or against parties to it but by or against their legal representatives are excluded from the scope of O. 6 (*a*). On this point there is no difference between the rule under the Civil Procedure Code and the one in O. 6 (*a*). They both refer to all suits on bills of exchange, hundis or promissory notes; there is no limitation that the suit should be by or against parties to the instrument. So long as the suit can be properly described as a suit on a bill of exchange, hundi or promissory note, it can be, and in the High Court it must be brought in the summary form. A suit on a negotiable instrument by or against a legal representative is still a suit on the instrument and will fall under O. 6 (*a*). It is only if any other cause of action is added not based on the instrument that the suit may fall outside the scope of the order; if the liability sought to be enforced is solely under the instrument it would not matter whether it is sought to be enforced against a party to the instrument or a legal representative of such a party such as an executor, or administrator, or heir of his. The English practice is in accordance with this view; there does not seem to be any proper reason to adopt a different rule here. Undoubtedly where summary suits are brought against executors, administrators, or other legal representatives who were not parties to the instrument, the rule as to granting leave to defendants will be liberally interpreted as the learned Judge observes. In such an action unconditional leave to defend will generally be given if the defendant has any reasonable ground for asking that the claim should be strictly proved. That removes any hardship that a legal representative defendant may be put to by the adoption of the summary procedure.

It is argued that summary procedure is not available where, apart from the note sued on, other facts have to be proved to make the defendant liable as no evidence is taken

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in such suits, and *Remfry* v. *Shillingford* (1) and *Bhupati Ram* v. *Sourendra Mohun Tagore* (2) are cited in support of the contention. To meet the objection raised in these cases the law has been changed under the new Code of 1908 by adding to R. 2 (2) of O. 37 a provision which says that if leave to defend is not obtained "the allegations in the plaint shall be deemed to be admitted" making it unnecessary to prove them by evidence. The same rule applies under O. 6 (*a*), for it adopts the rules of O. 37, unless modified by itself. These decisions are therefore of no force now.

We hold that suits on bills of exchange, hundis and promissory notes by or against legal representatives of parties can and must be brought in the High Court in the summary form.

The case will go back to the learned Judge on the Original Side for disposal. The costs of the reference will be costs in the cause.

A.S.V. *Case remanded.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE DEVADOSS AND MR. JUSTICE SUNDARAM CHETTY.

Rachamadugu Rangiah and others .. *Appellants** (*Respondents* 21 *to* 24).

v.

Y. V. Appaji Rao (Receiver in I. P. No. 3 of 1920, District Court, Anantapur). ... *Respondent* (*Petitioner*).

Rangiah v. Appaji Rao.

Provincial Insolvency Act, Ss. 53, 28 (7)—Transfer of property by insolvent within two years of date of presentation of petition but more than two years before date of order of adjudication—Application under S. 53 to set aside—Maintainability.

An application to set aside a voluntary transfer lies under S. 53 of the Provincial Insolvency Act even if the transfer was more than two years before the date of the order of adjudication provided it was within two years before the date of the presentation of the petition.

Cl. 7 of S. 28 of the Act governs S. 53.

S. 53 of the Act is based upon the corresponding provision in the English Act and in interpreting S 53 the Court must take into consideration what the Law of Bankruptcy is under the English Act.

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*A A O Nos. 307 of 1924 and 91 of 1925. 23rd September, 1926.

1. (1876) I L R 1 C 130.
2. (1903) I L R 30 C 446.

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Appeals against the orders of the District Court of Anantapur in I. A. No. 271 of 1921 in I. P. No. 3 of 1920.

K. Krishnaswami Aiyangar and *S. Ranganatha Aiyar* for appellants.

B. Somayya for respondent.

The Court delivered the following

JUDGMENT :—These appeals are against the order of the District Judge of Anantapur annulling certain transfers of property under S. 53 of the Provincial Insolvency Act. It is contended for the appellants that S. 53 of the Act does not apply as the transfers of property were more than two years before the date of the adjudication of the insolvent It is urged that the expression "is adjudged insolvent" can only refer to the adjudication of the insolvent and not to the date of the presentation of the petition on which the adjudication was made. The question for determination is, does an application to set aside a voluntary transfer lie under S. 53 of the Provincial Insolvency Act if the transfer is more than two years from the date of the order of adjudication but within two years from the date of the presentation of the petition on which the adjudication was made? This point is covered by authority so far as our High Court is concerned.

In *Sankaranarayana Aiyar* v. *Alagiri Aiyar* (1) Oldfield and Sadasiva Aiyar, JJ., considered this point at considerable length and came to the conclusion that the adjudication referred to in S. 36 of the old Act had to be treated as made on the date of the presentation of the petition on which the insolvent was adjudicated. It is contended that this decision is wrong and is opposed to the view of the Bombay and Lahore High Courts. The argument is that under S. 53 the period of two years is to be calculated backwards from the date of adjudication as the clause "if the transferor is adjudged insolvent within two years after the date of the transfer" can only mean the date of the order of adjudication and not the date of the presentation of the petition on which the adjudication is made, that cl. 7 of S. 28 cannot govern the plain meaning of the words in S. 53, and if the Legislature intended that the two years should be calculated backwards from the date of the presentation of the petition the expression "is adjudged insolvent" would not have been used, for in S. 54 it is clearly enacted that the transfer should be within three months of the

1. (1918) 35 M L J 296.

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petition presented for adjudication. No doubt there is a difference between the wording of S 53 and that of S. 54. In S. 53 the clause is—

"Any transfer............shall, if the transferor is adjudged insolvent within two years after the date of the transfer, be voidable.............."

S. 54 is—

"Every transfer of property ....shall, if such person is adjudged insolvent on a petition presented within three months after the date thereof, be deemed fraudulent and void................"

If S. 53 stood alone, it might be contended with some show of reason that the expression "is adjudged insolvent" can only mean the order of adjudication, but in cl. 7 of S. 28 it is enacted that an order of adjudication shall relate back to and take effect from the date of the presentation of the petition on which it is made. The question is, does cl. 7 of S. 28 govern S. 53. It is suggested that cl. 7 is not an independent section as in the English Act and therefore it cannot be held to govern the provisions of S. 53. This argument is fallacious. S. 28 lays down the consequences that flow from the order of adjudication. It is a general provision relating to adjudication and the consequences of adjudication. S. 28 (7) is therefore a general clause which applies to all dealings by or with the insolvent unless any particular dealing is expressly exempted from its operation.

S. 53 is based upon the corresponding provision in the English Act and in interpreting S. 53 we must take into consideration what the Law of Bankruptcy is under the English Act. Reliance is placed upon a judgment of Wright, J., in *Reis, In re. Clough, Ex parte* (2) where the learned Judge observed that there was a difference between the meaning of the words "adjudicated bankrupt" and the meaning of the words "becoming bankrupt". The expression in S. 47 of the English Act is "If the settlor become bankrupt." It was contended before Wright, J., that the expression "becomes bankrupt" should be held to mean "being adjudged bankrupt" and he construed the expression "becoming bankrupt" as insolvency commencing at the time of the first of the acts of bankruptcy proved to have been committed within three months next preceding the date of the presentation of the bankruptcy petition. He did not accept the contention that the expression "adjudged bankrupt" meant only the actual adjudication of the insolvent. He only stated the contention that there was a distinction between the use of the

2. (1904) 1 K B 451 at 455.

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words "adjudged bankrupt" and the use of the words "becoming bankrupt". There is no reason for overlooking the clear provision in S. 28 (7) in considering the other sections of the Act. It is a well-known canon of construction that the Courts should construe the provisions of legislative enactments in such a way as not to impute inconsistency to the Legislature. Where the provisions are reconcilable the Courts should try to reconcile. They should not attach importance to a single phrase or clause in one section and overlook the clear provision in other sections which are of a general character. There are exceptions to the general provision in S. 28, cl. 7. S. 51 which reads as follows:

> "Where execution of a decree has issued against the property of a debtor, no person shall be entitled to the benefit of the execution against the Receiver except in respect of assets realised in the Courts of the execution by sale or otherwise before the date of the admission of the petition,"

contains an exception to S. 28 (7). A creditor or a debtor may present a petition for adjudication of the debtor. The petition may be returned for correction and some time may elapse before the petition is admitted by the Court. In such cases the date from which the time should be reckoned is not the date of the admission of the petition but that of the presentation thereof. Under S. 55 which relates to *bona fide* transactions a transaction would be held to be good if it takes place before the date of the order of adjudication and if the person with whom such transaction takes place had not, at the time, notice of the insolvency petition by or against the debtor. If the argument of appellants is to hold good a voluntary transfer made a day before the presentation of the insolvency petition cannot be attacked if the Court does not adjudicate the insolvent for two years. The policy and the scope of the Insolvency Act is to prevent fraudulent preference and fraudulent transfers and the period mentioned in S. 53 has nothing to do with the delay of the Court in passing the order of adjudication. The matter might be taken as far as the Privy Council and if it takes five years for the matter to be finally settled by the Privy Council, could it be said that a voluntary transfer made a few days before the presentation of the insolvency petition could not be attacked by reason of the adjudication not having been made for a considerable time owing perhaps to causes over which the Court might not have control? Oldfield and Sadasiva Aiyar, JJ., have given cogent reasons for their conclusion that cl. 6 of S. 16 of the old Act corresponding to cl. 7 of S. 28 of the present Act correspond-

ed to S. 53 of the present Act. It is unnecessary to consider all the arguments advanced in that case.

In *Rakhal Chandra Purkait* v. *Sudhindra Nath Bose* (3), a Bench of the Calcutta High Court held that the provisions of S. 36 of the Provincial Insolvency Act were to be read with S. 16 (6) of the Act. In *Sheonath Singh* v. *Munshi Ram* (4) a Bench of the Allahabad High Court concurred in the view taken by this Court in *Sankaranarayana Aiyar* v. *Alagiri Aiyar* (1). The learned Judges observed :

"........... the view which we take is the view which was always taken from the earliest days in the administration of the Bankruptcy Law for reasons inherent in the policy of the Bankruptcy Law,..........some of which are contained in that judgment of the Madras High Court."

The case that is strongly relied upon by Mr. K. S. Krishnaswami Aiyangar is *Nagindas* v. *Gordhan Das* (5). In that case Sir Norman Macleod, C. J. and Coyajee J., held that the point of time from which the two years' period mentioned in S. 53 was to be calculated was the date on which the order of adjudication was made and not the date of the presentation of the petition. With very great respect we dissent from the view of the two learned Judges. They do not discuss at length the point whether clause 7 of S. 28 controls the provisions of S. 53. They refer to the judgment of Wright, J. in *Ex parte Clough* (2), and after referring to corresponding provisions in the English Act and the Provincial Insolvency Act, conclude at page 738 :

"It cannot be denied that a person is adjudged insolvent on the day on which the order is made, though the effect of the order on the insolvent's property relates back to an earlier date,"

and observe

"Therefore, in our opinion, if it had been intended that a voluntary transfer should be voidable if made within two years from the date of the presentation of the petition on which the adjudication order is made, there was no reason why that should not have been as clearly stated in S. 53 as it is in S. 54, and we do not think that the doctrine of 'relation back' can be imported into the former section, so as to make it appear that the point of time from which the two years are to be calculated is the date of the presentation of the petition and not the date when the transferor is adjudged insolvent."

We fail to see why the general provision of law in cl. 7 of S. 28 should not be read into S. 53 unless the clear terms of S. 53 are against reading that clause into it. It cannot be suggested that the Indian Legislature made a departure from

1. (1918) 35 M L J 296. 2 (1904) 1 K B 451 at 455.
3. (1919) I L R 46 C 991 4. (1920) I L R 42 A 433.
5. (1925) I L R 49 B 730.

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the English Law in enacting S. 53. Under the English Law the relation back is to the available acts of bankruptcy or the first of the available acts of bankruptcy. S.43 of the English Act enacts :

> "The bankruptcy of a debtor, whether the same takes place on the debtor's own petition or upon that of a creditor or creditors shall be deemed to have relation back to, and to commence at, the time of the act of bankruptcy being committed on which a receiving order is made against him, or, if the bankrupt is proved to have committed more acts of bankruptcy than one, to have relation back to, and to commence at, the time of the first of the acts of bankruptcy proved to have been committed by the bankrupt within three months next preceding the date of the presentation of the bankruptcy petition."

The Indian Legislature in enacting cl. 7 of S. 28 lays down that the order of adjudication shall relate back to and take effect from the date of the presentation of the petition on which it is made and not from the act of bankruptcy on which a receiving order is made or, if there are more acts of bankruptcy than one, the first of the acts of bankruptcy committed within three months next preceding the date of the bankruptcy petition.

In *Ghulam Muhammad* v. *Panna Ram* (6) the Lahore High Court takes the same view as that of the Bombay High Court in *Nagindas* v. *Gordhan Das* (5). The learned Judges refer to the decision in *Sankaranarayana Aiyar* v. *Alagiri Aiyar* (1) and comment on the argument of Sadasiva Aiyar, J. and observe that his argument merely amounts to an admission that the framers of the Act committed a mistake and an explanation how the mistake came to be committed. The view of the two learned Judges is opposed to the view of the Calcutta High Court, *Rakhal Chandra Purkait* v. *Sudhindra Nath Bose* (3) and to the decision in *Sankaranarayana Aiyar* v. *Alagiri Aiyar* (1). With due respect we must say that no convincing argument has been referred to in their judgment as to why S. 16 (6) of the old Act should not be read into S. 36 of the Act. In *Madhu Sardar* v. *Khitish Chandra Banerjee* (7) Mookerjee and Beachcroft, JJ. held that S. 34 of the Provincial Insolvency Act restricts the operation of cl. 6 of S. 16 and the provision in S. 34 with regard to the assets realised in execution must be held to be an exception to the general rule laid down in S. 16 (6) of the old Act. On a careful consideration of the relevant sections of the Act and the case-law on the point we have no hesitation in holding that

1. (1918) 35 M L J 296.
3. (1919) I L R 46 C 991.
5. (1925) I L R 49 B 730.
6. (1922) 72 I C 433.
7. (1914) I L R 42 C 289.

the period of two years should be calculated backwards from the date of the presentation of the petition on which the adjudication is made.

As to the merits in Appeal No. 307 the learned District Judge has discussed the evidence in paragraphs 19 and 20 of his judgment. We have been taken through the evidence on this point and we see no reason to differ from the finding of the learned Judge that the purchase under Ex. III was not made in good faith by the appellants. One of the items of consideration for the sale was an amount due under a mortgage bond. The mortgage bond has not been produced and there is no reliable evidence that the insolvent undertook to pay the appellants a sum of money which a third person owed him on a mortgage. Neither the original mortgage deed said to have been executed by the insolvent nor a registration copy of it was produced by the appellants. We therefore accept the finding of the learned Judge on this point without hesitation.

In C. M. A. No. 91 of 1925 the 7th respondent is the first appellant. The learned Judge discusses his case in paragraph 22 of the judgment. Though the appellant is a stranger to the insolvent, yet it is remarkable that he did not care to make any enquiry as to why the insolvent was executing a number of documents on the same day alienating his property to several persons. There is one circumstance which ought to be taken into consideration ; on the day on which this document was executed, a suit was filed and an injunction was obtained against the insolvent alienating any of his properties. No doubt the appellant says she was not aware of the issue of an injunction. But it is very unlikely that when a man in well-to-do circumstances alienates his immoveable property in favour of several persons and executed on the same day a number of documents, the persons who are parties to the documents would not have taken the trouble to find out why he was doing so. If a person abstains from enquiry he cannot be said to have acted *bona fide*. We therefore agree with the learned District Judge in holding that the transaction evidenced by Ex. XIX is void against the Official Receiver.

The 28th respondent is the legal representative of the 4th respondent in the Lower Court. The sale in his favour is evidenced by Ex. XVI. One of the items of consideration is the amount due on a promissory note. The promissory note has not been produced and the evidence as to the passing

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of consideration for Ex. XVI is unsatisfactory. The evidence of P. Ws. 6 and 7 is not of much use. No account-books are produced, and it is strange that a family which has considerable money dealing should not have kept accounts to evidence their transactions. It is unnecessary to discuss the evidence in detail. We have no hesitation in holding that the transaction is void as against the Official Receiver.

In the result the appeals fail and are dismissed with costs.

A. S. V. *Appeals dismissed.*

[FULL BENCH]

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

(*Ordinary Original Civil Jurisdiction.*)

PRESENT :—SIR MURRAY COUTTS TROTTER, *Kt., Chief Justice,* MR. JUSTICE KRISHNAN AND MR. JUSTICE BEASLEY.

In the matter of Natha Venkatesa Perumal *alias* Yelchuri Sri Ramulu Chetti, a minor ... *Plaintiff**.

F. B. — Venkatesa Perumal, *In re.*

Guardians and Wards Act of 1890, *Ss.* 34, 7 (1)—*Guardian for minor—Appointment of—Procedure proper to be followed in case of—Order of appointment making furnishing of security condition precedent to actual appointment coming into force—What amounts to—Validity—Security not furnished by guardian—Effect—Age of majority of minor in case of—Indian Majority Act of* 1875, *S.* 3—*Effect.*

An order made by a Judge in Chambers appointing the natural father of a boy as his guardian under the Guardians and Wards Act ran as follows:—

"That upon *L*, the petitioner herein, furnishing security to the satisfaction of the Registrar of this Court for a sum of Rs 5,000 only, he be, and hereby is, appointed guardian of the property of the said minor during his minority or until the further order of this Court."

L did not furnish the required security and died a few months afterwards without furnishing any security at all in compliance with the condition in the order. The question for decision was whether, having regard to the events that happened and to the terms of the order set out above the minor was to be regarded as subject to the longer term of minority ending at 21 provided by the Indian Majority Act or was to be regarded as having attained his majority, when he completed his 18th year

Held (1) that the order in question made the actual appointment of the guardian coming into force dependent upon a prior furnishing of the security; (2) that the said order was *ultra vires* of the statute, and was bad *in toto;* and (3) that the minor did not, in the events that happened, become a ward of the Court, and his minority was not extended to 21.

Procedure proper to be followed for appointing a guardian for a minor.

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*O P No. 212 of 1924. 19th October, 1925.

F. B.

Venkatesa Perumal, *In re.*

Case referred to a Full Bench in O. P. No. 212 of 1924, on the file of the High Court, at the instance of Srinivasa Aiyangar, J.

V. Radhakrishnayya for plaintiff.

Respondent was not represented.

The judgment of the Court was delivered by

Coutts Trotter, C. J.

Coutts Trotter, C. J.:—This is a matter which has been put before a Bench on the suggestion of the learned Trial Judge, Srinivasa Aiyangar, J., because it raises a question of some difficulty and some conflict of authorities. The facts are these. There was a minor called Natha Venkatesa Perumal Chetti. On the 20th November, 1924, an order was made by Waller, J. in Chambers conditionally appointing the natural father of the boy as his guardian under the Guardians and Wards Act. Part of the order was that the father was to furnish certain security. He did not do so and he died in the following July without having furnished any security at all in compliance with the condition contained in the order. On the 15th of August, 1925, the minor became 18 years old. The question we have to determine is whether, having regard to the events that happened and to the terms of the order of Waller, J., the minor is to be regarded as subject to the longer term of minority ending at 21 provided by the Indian Majority Act or is to be regarded as having in August attained his majority, when he completed his 18th year. We will first refer to the relevant statutory provisions. S. 3 of the Indian Majority Act (IX of 1875) runs as follows :—

"Every minor of whose person or property or both a guardian......has been or shall be appointed or declared by any Court of Justice before the minor has attained the age of 18 years......shall, notwithstanding anything contained in the Indian Succession Act (X of 1865) or in any other enactment, be deemed to have attained his majority when he shall have completed his age of twenty-one years, and not before."

The question, therefore, raised by that Act is whether there has been appointed or declared by a Court of Justice such a guardian in which case his majority automatically on the making of the order is prolonged to the age of 21. We therefore turn to the Guardians and Wards Act (VIII of 1890) to see what its provisions are with regard to the appointment of guardians. By S. 7 (1):—

"Where the Court is satisfied that it is for the welfare of a minor that an order should be made (*a*) appointing a guardian of his person or property, or both, or (*b*) declaring a person to be such a guardian, the Court may make an order accordingly."

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Then finally by S. 34, it is provided as follows :—

"Where a guardian of the property of a ward has been appointed or declared by the Court..........he shall (*a*) if so required by the Court, give a bond as nearly as may be in the prescribed form, to the Judge of the Court to enure for the benefit of the Judge for the time being with or without sureties, as may be prescribed, engaging duly to account for what he may receive in respect of the property of the ward."

The short point here is this : Was the conditional order which was made in this case *intra vires* of the statute under which the appointment is made ? A suggestion is made that the only power given under S. 34 is to impose the duty of finding security and executing a bond on the person who is before the Court in the capacity of an appointed guardian. If that be so, there would be no power to impose such a condition upon a person who is merely an aspirant to the office of guardian before the Court actually appoints him. There are two different opinions in this Court on the subject ; one is the opinion of Sadasiva Aiyar, J. contained in *Gopammal* v. *Srinivasa Aiyangar* (1), in which he expressed the opinion that these suspensory conditions are not warranted by the words of the section, and that the mofussil rules, the Civil Rules of Practice, which appear to validate them are thus *ultra vires* under the Act. In our opinion that view is the correct one and the later opinion expressed by a Bench of this Court consisting of Ayling and Seshagiri Aiyar, JJ. reported in *Subba Naik* v. *Rama Aiyar* (2) to the contrary is incorrect. If this be so, the sole question that arises is this : Was this order wholly bad or can we sever the valid from the invalid ? On that it seems to us that, if the learned Judge had as it were definitely made an appointment but merely hampered it with a condition warranted by the Act, that would be one thing and this Court might be able to say that the part creating the guardian was positive and effectual and reject the rest demanding the security. That seems to have been the view adopted by Stephen, J. in *Gopal Chunder Bose* v. *Gonesh Chunder Srimani* (3). Apparently that view has not been accepted in later cases by other Judges in Calcutta. The matter, we think, turns upon the actual wording of the order : and that wording is this :

"That upon Lakshminarasimhalu Chetti, the petitioner herein, furnishing security to the satisfaction of the Registrar of this Court for a sum of Rs 5,000 only, he be, and hereby is, appointed guardian of the property of the said minor during his minority or until the further order of this Court."

1. (1916) 30 M L J 508. 2. (1917) I L R 40 M 775
3. (1906) 4 C L J 112.

F. B.

Venkatesa Perumal, *In re.*

Coutts Trotter, C. J.

It seems to us impossible to say that the learned Judge who passed that order could have meant to do otherwise than make the actual appointment of the guardian coming into force, dependent upon a prior furnishing of the security. Therefore, if this order is bad, we think it is bad *in toto*. No practical difficulty will, as we conceive it, arise, as we think it can very easily be met by adopting a different form of procedure. The mischief of these suspensory orders, apart altogether from the question as to whether they are legal or invalid, is that the matter goes before the Judge who makes these suspensory orders and then the papers go into the office where it is nobody's business to see what is being done about it. The order is not complied with, and then somebody finds out that the minor, whom it was desired to protect, has attained his majority, and the Court is powerless because the guardian has failed to carry out its directions and the Court has kept no control over the matter by reason of the nature of the order so as to summon the guardian and ask him "Why have you not furnished the security?" The remedy seems to us to be quite simple. Let the learned Judge, before he makes the appointment of a guardian, if he is satisfied that it is a proper case for the minor to have a guardian in charge of his property and of his affairs, make enquiries about the proposed guardian and satisfy himself fully whether, if appointed, he will be in a position and will be willing to execute a bond to the amount that the learned Judge thinks that the use and the value of the estate demand : and, if after that, he makes an order, which the guardian disobeys, as to the furnishing of security, then there are remedies against the guardian without the consequence of the minor being left in this position, with no valid order appointing a guardian made at all and his ceasing, or rather being never taken, to be a ward of the Court. It is only right to say that we gather that in this case there is no question of any dangerous consequences to the minor owing to this misfortune that happened, but there are cases readily conceivable, and probably within the experience of many, where young men in this City are surrounded by circumstances which would make it imperative for the Court in their own interests to provide them with guardians. We think, therefore, that there being a doubt as to the validity of suspensory orders, it will be well if the practice of this Court in future were not to make orders in this form, but to adopt the procedure which we have suggested.

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We are therefore of opinion that this boy, Natha Venkatesa Perumal Chetti, is now a major.

A. S. V. *Reference answered.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE DEVADOSS AND MR. JUSTICE WALLER.

Nagarambille Tonkya ... *Petitioner* (Complainant)*

v.

Matta Jaganna and two others ... *Respondents (Accused).*

Tonkya *v.* Jaganna.

Criminal Procedure Code, S. 247—Jurisdiction to act under—Condition—Non-appearance of complainant when case called on for hearing—Acquittal of accused on ground of—Legality—Appearance of complainant later in day—Effect—Vakil for complainant—Appearance of—If enough under section.

When a summons case was called on for hearing, the complainant did not appear, and thereupon the Magistrate acquitted the accused under S. 247, Criminal Procedure Code. Later in the day, however, the complainant put in an appearance. The question for decision was whether, as the complainant appeared on the date fixed for the trial of the case, the Magistrate had no jurisdiction to acquit the accused—in other words, whether a Magistrate could not act under S. 247 before the Court-day closed

Held that, in the circumstances of the case, the Magistrate had jurisdiction to act under S. 247, and that he was not obliged to wait till the close of the Court-day before doing so.

Per Devadoss, J.:—The words "upon the day appointed for the appearance of the accused," in S. 247 do not mean any time before the close of the working day The complainant should appear when the case is called on for hearing.

The presence of the complainant's vakil alone is not sufficient compliance with the requirements of S. 247.

Petition under Ss. 435 and 439 of the Code of Criminal Procedure, 1898, praying the High Court to revise the order of the Second Class Magistrate of Sompeta in Calendar Case No. 200 of 1925.

K. Bhashyam Aiyangar for petitioner.

K. N. Ganapathi for the *Public Prosecutor* for the Crown.

The respondents were not represented.

The Court delivered the following

Devadoss J.

JUDGMENTS :—*Devadoss, J.* :—This a petition to revise the order of acquittal passed by the Second Class Magistrate of Sompeta under S. 247 of the Code of Criminal Procedure.

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*Cr. R. C. No. 772 of 1925. 9th March, 1926.

Tonkya v. Jaganna. — Devadoss, J.

It is contended by Mr. Bhashyam Aiyangar for the petitioner that the complainant and his witnesses appeared at 11-30 a. m. on the date fixed for the trial of the case and the Magistrate acted illegally in acquitting the accused on the ground that the complainant was absent and that the appearance of the complainant on the date is a sufficient compliance with S. 247. The question is whether the absence of the complainant at the time when the case was taken up for hearing was sufficient to justify the Magistrate in dealing with the case under S. 247

That section is in these terms:—

> "If the summons has been issued on complaint, and upon the day appointed for the appearance of the accused, or any day subsequent thereto to which the hearing may be adjourned the complainant does not appear, the Magistrate shall, notwithstanding anything hereinbefore contained, acquit the accused, unless for some reason he thinks proper to adjourn the hearing of the case to some other day."

The section makes it obligatory upon the Magistrate to acquit the accused if the complainant does not appear, unless he thinks proper to adjourn the hearing of the case to some other day. The contention is that it is sufficient if the complainant appears at any time during the day, and that "the day" means the ordinary working hours of the Court, *i. e.*, from 11 a. m. to 5 p.m. If the contention is to hold good it would mean that the Magistrate has to wait till 5 p. m. before dealing with a case under S. 247. There is nothing in the section which would justify the construction that the words "upon the day appointed for the appearance of the accused," etc., mean any time before the close of the working day. In O. 9, R. 8 of the Civil Procedure Code, the wording is, "where . . . . the plaintiff does not appear when the suit is called on for hearing, the Court shall make an order that the suit be dismissed," etc. From this it is clear that the plaintiff should be present when the case is called on for hearing. In the case of a complainant, the complainant should appear when the case is called on for hearing. The object of S. 247 is to prevent the complainant from being dilatory in the prosecution of the case, and if he does not care to be present when the case is called on, the accused is entitled to an acquittal unless the Magistrate chooses for reasons he thinks proper to adjourn the case. It may, no doubt, appear to be a hardship that a complainant who was present from 11 a. m. to 4-30 p. m. should have his case dismissed if he happens to be away for a few minutes when the case is taken up; but the question is not whether there is hardship or not but

Tonkya v. Jaganna.

Devadoss, J.

what is the meaning of the section. The complainant is bound to be present on the day to which the case is posted, and if he wants to be absent during any portion of the day he should take the Court's permission for doing so. But, if he does not do so, he does so at his risk. It is suggested that such a construction would entitle the Magistrate to dismiss a complaint under S. 247 even after the prosecution case is closed and before he delivers judgment. No doubt, it would be so; but that is not a ground for giving a construction to a section different from what the clear words would justify.

The presence of the complainant's vakil alone is not sufficient compliance with the requirements of S. 247. In civil cases the presence of a party's vakil is considered as the appearance of the party. But in criminal cases, except where the Court dispenses with the personal attendance of the accused and allows him to appear by a pleader or agent, his presence is essential. A complainant cannot be represented by a pleader in order to take away the jurisdiction of the Magistrate to proceed under S. 247. Where a vakil appears for the complainant, it is not likely that the Magistrate would dismiss the complaint under S. 247, for the vakil would represent to the Court that his client was unavoidably absent or that he had just gone out of the Court-house for a very proper purpose.

This case has been referred to a Bench by Wallace, J., by reason of the view taken by Jackson, J., in Criminal Revision Case No. 229 of 1925. In that case Jackson, J., held that S. 247 must be strictly interpreted and the appearance of the complainant during any portion of the day was sufficient compliance with S. 247. With great respect, I am unable to agree with that view. We should not consider the hardship that may be caused to the complainant in construing the section. Instructions may be given to Magistrates not to dismiss cases under S. 247 unless they are satisfied that the complainant is keeping out of the way and to wait for a reasonable time to enable the complainant to appear; but the absence of such instructions would not be a ground for giving a forced construction to the very clear words of the section.

The view of Jackson, J., is opposed to the view taken by Hutchins, J., in *Kuttiyali* v. *Pari Makri* (1). There the learned Judge overruled the contention that the Magistrate

1. (1884) I L R 7 M 356.

should wait till the close of the day before he could act under S. 247. Tonkya v. Jaganna.

Devadoss, J.

It is next contended that on the merits the petitioner is entitled to have the order of the Magistrate set aside. The petitioner appeared with his witnesses at 11-30 a. m. and it is alleged that the case was taken up and dismissed five minutes before the appearance of the complainant. Though the Magistrate could very well have waited for a short time, it cannot be said that the order of the Magistrate is illegal. He acted within his powers and when the order is not illegal it would not be right for this Court to interfere with it. Though the conduct of the accused was not all that could be desired, yet I do not think it would be right to set aside the order of the Magistrate in a case of this kind. The petition is dismissed.

Waller, J.

Waller, J. :—This petition raises a question as to the construction of S. 247, Criminal Procedure Code. A summons case was called on for hearing. The complainant not appearing, the Magistrate acquitted the accused under S. 247. Later in the day the complainant put in an appearance. It is now argued on his behalf that as he appeared on the day to which the case had been adjourned, the Magistrate had no jurisdiction to acquit the accused—in other words, that a Magistrate cannot act under the section before the Court-day has closed.

There is direct authority to the contrary—vide *Rangaswami* v. *Narasimhulu* (2) and *Kuttiyali* v. *Pari Makri* (1). The earlier of these two rulings, which dates back over 40 years, follow a still older decision of the year 1874. So far as I am aware the view that has prevailed for over 50 years was not questioned till it was dissented from by Jackson, J., last year in Criminal Revision Case No. 229 of 1925. With great respect, I am unable to follow his line of reasoning. He appears to think that there is something in the section that prevents a Magistrate from taking up a particular case twice on the same day, that, in fact, a Magistrate cannot, if a complainant does not appear in the morning, adjourn the case till the afternoon. I can myself see nothing in the section that prevents a Magistrate from so doing. Indeed, I think that, as a rule, he would be well advised to give a complainant whose case is called on early in the day, some latitude before he decides

1. (1884) 7 M 356. 2. (1884) 7 M 213.

Tonkya v. Jaganna. — Wallace, J.

to apply S. 247. If, however, he decides to act at once, when a complainant fails to appear on his case being called on, I am clearly of opinion that he has jurisdiction to do so and that he is not obliged to wait till the close of the Court-day before doing so. I agree therefore in dismissing the petition.

A.S.V. *Petition dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE SPENCER.

Appu Bhatta ... *Appellant** (*Plaintiff*)

v.

Uma Sundari Amma and another ... *Respts.* (*Defendants*).

Appu Bhatta v. Uma Sundari Amma.

Madras Act I of 1914—Applicability—Will—Unborn great-grandchildren—Bequest in favour of—Validity—Effect of Madras Act I of 1914 upon—No intervening life-estate—Effect—Great-grandchildren born after death of testatrix—Effect—Life-estate—Life-estate determinable on birth of children—Bequest of—What amounts to.

A Hindu lady executed a will in 1883 and died in 1886. The will provided that her grandson *S* and his wife *Y* should manage the estate as agents for the testatrix, collect the amount due to her under a mortgage and out of it pay off mortgages due by her and meet the expenses of her funeral ceremonies and maintain their children, and lastly, without alienating the property in any manner, they should deliver all the properties, moveable and immoveable, to the great-grandchildren of the testatrix upon their attaining their majority.

At the time when the will was made and also when the testatrix died, no great-grandchildren had been born The plaintiff, a great-grandson of the testatrix, was born in 1899, and he came of age in 1917. In a suit brought by him in 1920 to recover the property of his great-grandmother on the strength of her will, *held* (1) that the will did not confer a life-interest upon *S* and his wife; (2) that it did not confer upon the testatrix's grandchildren a life-estate which was determinable by the birth of children; and (3) that the bequest in favour of the great-grandchildren, being one in favour of persons unborn at the death of the testatrix, was void, and, there being no intervening life-estate, the same was not validated by Madras Act I of 1914

A disposition invalid at the date of the testatrix's death could not be rendered valid by the subsequent birth of a great-grandson, nor could an intestacy be converted into a testacy in consequence of an event happening after the death of the testatrix.

Second Appeal against the decree of the District Court of South Kanara in A. S. No. 408 of 1921 preferred against the decree of the Court of the Principal District Munsif of Mangalore in O.S. No. 97 of 1920.

B. Sitarama Rao and *K. Srinivasa Rao* for appellant.

K. Sundara Rao for respondents.

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*S A No. 449 of 1923. 30th October, 1925.

Appu Bhatta v. Uma Sundari Amma.

The Court delivered the following

JUDGMENT :—The plaintiff in this suit claimed the property of his deceased great-grandmother on the strength of a will executed by her in 1883. The testatrix died in 1886. The plaintiff was born in 1899 and he must have come of age in 1917. The suit was brought in 1920. The will (Ex. II) provided that the testatrix's grandson Subraya, who is the 2nd defendant in this suit and his wife, Yamuna Bai, should manage the estate as agents for the testatrix, collect the amount due to her under a mortgage and out of it pay off mortgages due by her and meet the expenses of her funeral ceremonies and maintain their children and lastly, without alienating the property in any manner, they should deliver all the properties, moveable and immoveable, to the great-grandchildren of the testatrix upon their attaining their majority. At the time when the will was made and also when Laxmi died, no great-grandchildren had been born. The will on the face of it is in favour of a person unborn at the decease of the testatrix. Madras Act I of 1914 has since validated bequests and transfers in favour of unborn persons in the Presidency of Madras. In *Venkayamma* v. *Narasamma* (1) and *Muthuswami Aiyar* v. *Kalyani Ammal* (2) it has been held that this Act has the effect of validating dispositions made under wills executed before the date when the Act came into force, provided that some life-estate was interposed. Abdur Rahim, J., observed that if there was no intervening life-estate, the argument of the appellant's vakil that only persons born on the date of the death of the testator could take, would no doubt have force. In *Shanmuga Devar* v. *Shanmuga Devar* (3) it was held for similar reasons that if a life-estate was created and an ulterior estate was bequeathed to a person on his attaining age, the disposition would be valid provided that the final vesting took place after the passing of the Act. It has, therefore, been argued in the first place by Mr. Sitarama Rao that Ex. II creates a life-estate. But I cannot accept this contention, because the will provides that the 2nd defendant, Subraya, and his wife were to hand over all the properties, moveable and immoveable, upon their great-grandchildren attaining their majority. The will does not give them authority to retain those properties for the length of their lives. The testatrix speaks of her grand-

1. (1916) I L R 40 M 540: 31 M L J 33 2. (1916) I L R 40 M 818.
3. (1919) 53 I C 203.

Appu Bhatta v. Uma Sundari Amma.

son and his wife as her "agents". It is obvious that after her death they could no longer fulfil the capacity of agents. Assuming that her intention was that they should be trustees or executors to carry out the provisions of her will, the question then arises whether a person unborn at the date of the will can avail himself of the provisions of the Act of 1914 in a case where no life-estate is interposed between the death of the testatrix and the time provided for his taking the property. The case referred to in the Lower Appellate Court's judgment, *Varadaraja Mudaliar* v. *Narayanaswami Mudaliar* (4), is not of much help as it was a decision of Mr. Justice Kumaraswami Sastri in a case arising within the limits of the City of Madras to which Madras Act I of 1914 did not apply, although similar provisions have been applied subsequently by the Imperial Act VIII of 1921. If there was no person in whom the estate could vest at the date of the testatrix's death it follows that there was an intestacy. The vesting of an estate cannot be kept in abeyance or be, as the District Munsif observes, indefinitely postponed upon the bare contingency of the second defendant having male issue. It is hardly necessary to quote authorities. But Mayne's Hindu Law, page 512, West and Buhler's Hindu Law, pp. 179 and 112 and *Nilcomul Lahuri* v. *Jotendro Mohun Lahuri* (5) make it clear that the vesting of an estate cannot be kept in abeyance pending the happening of an uncertain event, nor by the intervention of trustees, as was the case in *Gordhandas Soonder Das* v. *Bai Ramcoover* (6).

Mr. Sitarama Rao's second argument therefore was that the testatrix's grandchildren took a life-estate which was determinable by the birth of children. The will, however, contains no valid gift of the remainder at the date when it was executed. There is no direction in it as to the disposal of the surplus income. To treat the grandchildren as having a life-estate defeasible upon the birth of children to them makes the gift in favour of unborn persons no more valid, as there is no provision in the will that if there should be no great-grandchildren born at the date of the testatrix's death the grandchildren should take the estate absolutely. In *Nafar Chandra Kundoo* v. *Ratan Mala Debi* (7) both the sons and his wife whom he was to marry were made beneficiaries under the will and were alive at the time of the testatrix's death and the

4. (1914) 27 M L J 681.
5. (1881) I L R 7 C 178.
6. (1901) I L R 26 B 449
7. (1910) 15 C W N 66.

property was vested in the executors. *Jamna Bai* v. *Dharsey* (8) was a case in which all the estate vested in trustees for the benefit of the son who was to be adopted by the testator's widow. It does not appear that the son to be adopted was unborn at the date of the testator's death. It was held in the end that the widow took an absolute estate. The facts in *Amrito Lall Dutt* v. *Surnomoyee Dassee* (9) which came up in *Amrito Lall Dutt* v. *Surnomoni Dasi* (10) and *Watkins* v. *Administrator-General of Bengal* (11) can be distinguished from the present case. The will in that case created a power. The question was whether a direction to accumulate the income of the estate was valid during the continuance of the life-estate. It was held that the accumulation could go on for so long a time as the absolute vesting of the entire interest could be withheld. No case has been quoted in which a disposition has been made in favour of a person unborn in which the vesting of the estate was postponed without the interposition of any life-estate.

I am therefore of opinion that the Lower Courts were right in finding that the dispositions in this case in favour of a person unborn were invalid and had not been validated by the passing subsequently of Madras Act I of 1914, seeing that if the validity of the transaction had been questioned at any time in probate or other proceedings undertaken after the testatrix's death but prior to the passing of that Act it must have been held that the will was invalid and that in consequence an intestacy had been created, and a disposition invalid at the date of the testatrix's death could not be rendered valid by the subsequent birth of a great-grandson, nor could an intestacy be converted into a testacy in consequence of an event happening after the death of the testatrix.

The Second Appeal is dismissed with costs.

A.S.V. *Second Appeal dismissed.*

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8. (1902) 4 Bom L R 893.
9. (1897) I L R 24 C 589.
10. (1898) I L R 25 C 662.
11. (1914) I L R 47 C 88.

[FULL BENCH.]

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—SIR MURRAY COUTTS TROTTER, *Kt., Chief Justice,* MR. JUSTICE JACKSON AND MR. JUSTICE SUNDARAM CHETTY.

O.A.O.K. Latchmanan Chettiar ... *Petitioner** *(Petitioner)*

v.

J. S. Kannappar and others ... *Respondents (Respondents in do.).*

F. B.
Latchmanan Chettiar
v.
Kannappar.

Civil Procedure Code (Act V of 1908), S. 115—"Court"—Chief Judge of the Presidency Small Causes Court acting under R. 4 of the Rules framed under the Madras City Municipal Act (IV of 1919)—Whether a Court or persona designata—Madras City Municipal Act, S. 59 (2) (b)—"Elections"—Meaning of.

The Chief Judge of the Court of Presidency Small Causes at Madras acting under R. 4 of the Rules framed under the Madras City Municipal Act is not a "Court," but a *persona designata* and therefore no revision lies to the High Court against his decision.

The Municipal Corporation of Rangoon v *M. A. Shakur*, (1925) I L R 3 R. 560 followed.

Parthasarathi Naidu v *Koteswara Rao*, (1923) I L R 47 M 369: 46 M L J 201 (F B) distinguished.

The word "Elections" in S. 59 (2) (*b*) of the Act means *completed elections* which have resulted in the creation of a councillor and does not cover disputes arising before such election; but though R. 4 purports to be made under S. 59 it is rendered valid by the generality of the powers conferred on the Governor in Council by S. 347 of the Act and the Rule is not vitiated by its descriptions as having been made under a section which is not applicable.

Quaere.—Whether it is entirely outside the ambit of the jurisdiction of the Commissioner and the Chief Judge acting under R. 4 to enquire into grounds of disqualification which do not appear on the face of the nomination paper and will involve an enquiry into facts

Petition under Ss. 115 of Act V of 1908 and 107 of the Government of India Act praying the High Court to revise the order of the Chief Judge of the Court of Small Causes, Madras, dated 13th September, 1926, in Municipal Election Revision Petition No. 1 of 1926.

K. S. Krishnaswami Aiyangar and *K. S. Rajagopala Aiyangar* for petitioner.

Vere Mockett, M. Damodaram Naidu and *S. Rangasami Aiyangar* for respondents.

The judgment of the Court was delivered by

Coutts Trotter, C. J.

The Chief Justice:—This is a Civil Revision Petition brought by Rao Bahadur Latchmanan Chettiar against an

*C R P No. 742 of 1926. 30th September, 1926.

F. B.

Latchmanan Chettiar v. Kannappar.

Coutts Trotter, C. J.

order made by the Chief Judge of the Small Cause Court in the following circumstances. On the 17th August, 1926, the petitioner was nominated as a candidate for election as a Divisional Councillor for the 29th Division of the City. It is not in dispute that the nomination paper was regular on the face of it but it was said that the petitioner was disqualified for these reasons. For some time past he had been an Honorary Presidency Magistrate of the City. On the 11th August he tendered his resignation having in mind, no doubt, S. 52 (1) (*b*) (*iv*) of the Madras City Municipal Act of 1919 which disqualifies a Presidency Magistrate which has been held to include an Honorary Magistrate for election as a Councillor. That resignation reached the Government on the 14th August and the Government passed a G. O. in the following terms :—

"The Governor in Council withdraws the powers of Honorary Presidency Magistrate for the City of Madras conferred on the undermentioned gentleman (*i. e.*, the petitioner) who has resigned his appointment."

On the 20th August an objection was put forward by the respondents alleging that the withdrawal by the candidate from his appointment as Presidency Magistrate only took effect by virtue of the G. O. withdrawing his powers which was subsequent to his nomination, and that therefore the nomination was bad. The objection was heard by the Commissioner acting under R. 4 hereinafter to be referred to of the Rules made under the Act and a petition was put in for revision before the Chief Judge of the Court of Small Causes under the same rule. Both officers pronounced the nomination to be invalid and struck his name off the list of nominations in accordance with R. 3. Against that decision of the Chief Judge this revision petition is brought.

Two main points have been argued before us—the first, which goes to the root of the whole matter, being that this Court has no jurisdiction to entertain any such petition, on the ground that the Chief Judge of the Small Cause Court is not a Court subject to the machinery of the Code of Civil Procedure but a *persona designata* whose decision was not only not appealable but cannot be called up in revision. It has been held by a Full Bench of this Court [*Parthasarathi Naidu* v. *Koteswara Rao* (1)] that the fact that his decision is not appealable so far from being a ground for holding that revision will not lie points decisively in the opposite direction. The appellant's contention as to the character in which the Chief Judge decided this matter depends partly upon a consideration

1. (1925) I L R 47 M 369: 46 M L J 201 (F B).

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of the relevant sections of the Municipal Act and the rules made thereunder, and partly on the effect of certain authorities which were cited to us. S. 59 (2) (*b*) of the Act provides that

"the Governor in Council may make rules which may provide for the adjudication by the Court of Small Causes of disputes ... .. arising out of elections."

In our opinion "elections" within the meaning of that section means completed elections which have resulted in the creation of a Councillor, and does not cover disputes arising before such election; but though R. 4 with which we are primarily concerned purports to be made under S. 59, we are of opinion that it is rendered valid by the generality of the powers conferred on the Governor in Council by S. 347 of the Act, and that the rule is not vitiated by its description as having been made under a section which is not applicable. R. 4 gives power to a registered voter to make an objection to the list of candidates. Thereupon

"the Commissioner is to give his decision on the objection in writing, which decision shall be final unless ...... a petition for revision is put in before the Chief Judge"

and in such cases it is argued that the Chief Judge acting under R. 4 is in effect the Court of Small Causes functioning through him alone, and that his decision is therefore subject to revision. It is said that this position is confirmed by O. 1 (*a*), R. 6 of the Rules of the Small Cause Court, 1912. The rule runs as follows :

"The Judges may sit apart or together at any time and any one or more of the Judges so sitting apart shall have all the judicial authority which is given to the Court by the principal Act or any other enactment for the time being in force, except in cases in which by such Act or other enactment or any rule or order having the force of law such powers are exercisable only by two or more Judges of the Court or only by the Chief Judge.

It shall be competent to the Chief Judge to direct that any application, petition or suit shall be heard by a Bench consisting of two or more Judges of the Court."

The argument is that if by any Act or rule a matter shall be referred to the Chief Judge alone, he is nevertheless acting as the Court. We are of opinion that this rule only applies to cases where the reference made by the Act or rule in question is clearly to the Court, though functioning through the Chief Judge, and that it leaves untouched the real question which we have to decide, namely, whether this power was conferred by R. 4 made under the Municipal Act upon the Chief Judge as the Court functioning through himself or upon him as *persona designata*. Looking at the Municipal Act, it is

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clear that the draftsman of that Act was quite alive to the distinction between the Court of Small Causes (S. 59) and the Chief Judge of that Court (*vide* S. 54). It is difficult to resist the inference that when the Chief Judge is referred to in the Act he was meant to act as a *persona designata* and not as representing the Court. The Full Bench decision in *Parthasarathi Naidu* v. *Koteswara Rao* (1) was relied upon for the proposition that whenever jurisdiction is vested in the
for the proposition that whenever jurisdiction is vested in the
Judge as representing that Court. In that case a vesting of jurisdiction in a District Judge was held to be equivalent to vesting the jurisdiction in the District Court, thereby subjecting his decision to the revisional powers of the High Court. It was pointed out in a judgment of a Full Bench in the Rangoon Court, *The Municipal Corporation of Rangoon* v. *M. A. Shakur* (2), reviewing all the authorities with which we respectfully agree, that though that reasoning may apply to a Court, which by its constitution has only one Judge, it cannot govern a case where jurisdiction is conferred on a single member of a Court consisting of three Judges. It is obvious that words might easily have been used to indicate that while jurisdiction was conferred on the Small Cause Court, that Court should only function through its Chief Judge. We think that that distinction drawn by the Rangoon Court was correctly drawn and that nothing in the decision of the Full Bench in *Parthasarathi Naidu* v. *Koteswara Rao* (1) precludes us from holding, as we do hold, that under the Municipal Act and the Rules the Chief Judge for this purpose is *persona designata* and not merely a selected member of the Court chosen to represent it. That being so, we have no jurisdiction to entertain this revision petition, and it must be dismissed with costs.

But we think it is desirable that we should say a few words on the second point which was elaborately argued before us. The point was that the Commissioner and the Chief Judge were confined to questions of form, and that it was entirely outside the ambit of their jurisdiction to enquire into grounds of disqualification which did not appear on the face of the nomination paper and would involve an enquiry into facts. The position of a Returning Officer in England is analogous generally to that of the Commissioner under the Madras Municipal Act, and it has been decided by a series of decisions in England, of which we need only cite *Pritchard* v.

1. (1923) I L R 47 M 369: 46 M L J 201 (F B). 2. (1925) I L R 3 R 560.

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Mayor, etc., of Bangor (3) and *Hobbs* v. *Morey* (4), that the Returning Officer is only to decide objections arising out of the nomination paper itself and not to go into questions relating to the personal qualifications of the candidate. Under S. 52 of the Madras Act, among the disqualifications enumerated are, that a person concerned is of unsound mind, or is interested in a contract with the Corporation. If the position be right that such allegations are to be investigated not after election but at the stage of candidature, the Commissioner might be faced with a series of elaborate enquiries relating to persons who might never reach the stage of election or appointment as a Councillor might indeed receive no votes at all. It is said that nevertheless the effect of the Madras Act is to throw the burden of conducting such enquiries upon the Commissioner with regard to every candidate at the stage of nomination. In view of our decision on the main point, it is unnecessary to pronounce upon this question. But we think it desirable to point out the doubts that have been raised as to the effect of the Madras Act and to suggest that it should be amended in a manner that shall make it clear whether it is intended to invest the Commissioner with the wide powers suggested by the respondents or to confine him to the purely ministerial function with which alone he would be clothed if the principle of the English cases is to be applied. If the latter view is to prevail, there seems to be no good reason for granting an appeal to the Chief Judge or indeed to any other tribunal.

N. S. *Civil Revision Petition dismissed.*

[FULL BENCH.]

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—SIR MURRAY COUTTS TROTTER, *Kt., Chief Justice*, MR. JUSTICE JACKSON AND MR. JUSTICE SUNDARAM CHETTY.

O. A. O. K. Latchmanan Chettiar ... *Petitioner**

v.

The Commissioner, Corporation of Madras and another ... *Respondents.*

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Latchmanan Chettiar v. Commissioner, Corporation of Madras.

Certiorari, writ of—Jurisdiction of High Court—Discretionary power—Applicant not questioning the jurisdiction of the Lower Court before it but taking the chance of a pronouncement on the merits—Effect.

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*C M P No. 3304 of 1926. 7th October, 1926.

3. (1888) 13 A C 241. 4. (1904) 1 K B 74.

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Where a person applying for a Writ of Certiorari, though armed with a point either of law or of fact which would oust the jurisdiction of the Lower Court, has elected to argue the case on the merits before that Court, he must be taken to have submitted himself to the jurisdiction of that Court which he cannot be allowed afterwards to seek to repudiate. In such a case the High Court is precluded from exercising in his favour the discretionary jurisdiction vested in it in issuing the writ.

Petition praying that in the circumstances stated in the affidavit filed therewith the High Court will be pleased to issue a writ of certiorari to the Commissioner, Corporation of Madras, and the Chief Judge, Court of Small Causes, Madras or either of them commanding him or either of them to send forthwith to and before this Court all and singular, the orders (1) of the Commissioner of the Corporation of Madras, dated 24th August, 1926 in the matter of the 29th (Royapettah) Division Election, (2) of the Chief Judge, the Court of Small Causes, Madras, dated 13th September, 1926, passed in revision of the said order of the Commissioner of the Corporation of Madras, with all things touching the same as fully and perfectly as they or either of them have been made by them or either of them and now remaining in the custody or power of both or either of them so that this Honourable Court may cause further to be done thereon, what of right and according to law this Honourable Court shall see fit to be done and for passing such further or other orders as this Honourable Court may consider just and necessary under the circumstances.

K. S. Krishnaswami Aiyangar and *K. S. Rajagopala Aiyangar* for petitioner.

Vere Mockett and *S. Rangaswami Aiyangar* for respondents.

The judgment of the Court was delivered by

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The Chief Justice.—This is an application for a writ of certiorari directed to the Commissioner of the Corporation of Madras and the Chief Judge of the Court of Small Causes to call up their orders passed in the matter of Rao Bahadur Latchmanan Chettiar declaring him to be disqualified as a candidate at the election about to be held to select a councillor for the 29th Division of this City. Our interference is invoked on the ground that both these officers acted without jurisdiction and that therefore their orders should be quashed. In such a matter we act not under statute but under the inherent powers which devolve upon us from the old Supreme Court of Madras. We therefore stand with regard to prerogative writs in the same position as the Court of King's Bench in England and in our opinion we ought to follow the rules laid down by that

Court in the decided English cases as to the scope and limitation of its jurisdiction. The facts were stated by us in our decision in C. R. P. No. 742 of 1926* and it is unnecessary to repeat them. The broad ground on which the jurisdiction of these officers is challenged is that whereas they were only empowered to inquire into disabilities appearing on the face of the nomination paper they in fact travelled outside that jurisdiction and went into a matter of substance which was arguable only on grounds not appearing on the face of the nomination paper. Mr. Mockett has taken the preliminary objection that *certiorari* will not lie where the person who applies for that writ has by his conduct taken the chance of a pronouncement in his favour by the Lower Court on the merits. Mr. Krishnaswami Aiyangar for the petitioner has frankly conceded that his client did argue the case on the merits both before the Commissioner and before the Chief Judge and that he did not only not confine himself to the contention that those officers had no jurisdiction to entertain an objection to the jurisdiction but that he did not take this point at all. The English authorities which were cited *prima facie* established the proposition that in such circumstances the applicant cannot obtain a writ of certiorari *ex debito justitiae* but the Court is exercising a purely discretionary power. See *Queen* v. *Justices of Salop* (1), *Queen* v. *Justices of Leicester* (2), *Queen* v. *Knox* (3), *Rex* v. *Williams* (4) and *Rex* v. *West Suffolk Compensation Authority* (5). The point taken by Mr. Krishnaswami Aiyangar is that failure to object to the jurisdiction of the Court whose order is sought to be quashed only debars the applicant when the objection is one involving the investigation of facts which were or should have been within the knowledge of the applicant when he was before the Lower Court, and does not apply to a contention of law. We see no warrant in the cases for drawing any such distinction, because in our opinion the test that they lay down is whether the applicant armed with a point either of law or of fact which would oust the jurisdiction of the Lower Court has elected to argue the case on its merits before that Court. If so, he has submitted himself to a jurisdiction which he cannot be allowed afterwards to seek to repudiate. We are of opinion that the applicant has so conduct-

*Since reported in *O. A. O K. Latchmanan Chettiar* v. *Kannappar,* (1926) 51 M L J 738 (F B).

1. (1859) 29 L J (N S) M C 59. 2. (1860) 29 L J (N S) M C 203.
3. (1863) 32 L J (N S) M C 257. 4. (1914) 1 K B 608.
5. (1919) 2 K B 374.

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ed himself as to preclude this Court from exercising a discretionary jurisdiction in his favour. The petition will therefore be dismissed with taxed costs.

The interim order passed on the 1st October will be vacated.

N. S. *Petition dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—SIR MURRAY COUTTS TROTTER, *Kt., Chief Justice* AND MR. JUSTICE CURGENVEN.

M.P.P.S.T. Palaniappa Chettiar and others . . *Appellants** (*Defendants*)

v.

Valliammai Achi . . . *Respondent* (*Applicant*).

Palaniappa Chettiar v. Valliammai Achi

Execution of decree—Application for—Death of decree-holder pending—Legal representative—Right to be substituted and to continue petition—Civil Procedure Code, S. 146, O. 21, R. 16, O. 22.

On the death of a decree-holder who is in course of executing his decree, his legal representative cannot be substituted in the execution petition and cannot continue it.

On appeal from the order dated 21st July, 1925 passed by the Hon'ble Mr. Justice Srinivasa Aiyangar in the exercise of the Ordinary Original Civil Jurisdiction of the High Court in C. S. No. 98 of 1911.

The following are the facts :—

A transferee-decree-holder, who had been recognised as such, filed an application for execution of the decree and transmission of the same to the Ramnad District after a fresh revival order. During the pendency of that application, the transferee-decree-holder died and his widow applied to be brought on record as the petitioner in the said execution petition as the heir and legal representative of her deceased husband and to be permitted to continue the further prosecution of the said petition. Though it was open to the legal representative to file a fresh application for execution, she apprehended there might be some objection on the ground of limitation or otherwise, and considered it safer to proceed to carry on the pending application for execution by bringing herself on record as legal representative.

Mr. Justice Srinivasa Aiyangar ordered that the widow should be brought on record as legal representative in the pend-

*O. S. Appeal No. 79 of 1925. 17th September, 1926.

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ing execution application, and permitted her to make the consequential amendments in the said petition. And the appeal was against that order of Mr. Justice Srinivasa Aiyangar.

K. Rajah Aiyar and *V. Ramaswami Aiyar* for appellants.

A. Krishnaswami Aiyar and *E. Vinayaka Rao* for respondent.

The Court delivered the following

JUDGMENT :—The question which this appeal raises is whether, on the death of a decree-holder who is in course of executing his decree, his legal representative may be substituted in the execution petition and may continue it. The learned Judge has acceded to the request of the widow of the transferee decree-holder to be so brought on in a pending petition, and the judgment-debtors appeal.

Although Mr. A. Krishnaswami Aiyar has endeavoured to persuade us that, where a right to pursue a remedy survives, it follows on general principles that a legal representative has a right to continue a proceeding initiated by his predecessor, we have no doubt that the question must be answered by reference to the specific terms of the Code of Civil Procedure. S. 146 of the Code is of no assistance, because it merely enacts that, save as otherwise provided, a proceeding which may be taken by any person may be taken by any other claiming under him. Since a decree-holder may file an execution petition, his legal representative after his death may file one. The competence of a transferee-decree-holder to do this is specially provided for by O. 21, R. 16, and assuming that that rule applies, by force of the words "by operation of law", to the case of a representative of a deceased decree-holder, such as we are now dealing with, the matter is carried no further. At the same time, we do not accept the argument that, because this rule allows one method of proceeding with execution, it excludes any other method. For an answer to the question raised it is necessary to go to O. 22, which relates to the "Death, Marriage and Insolvency of Parties." Rr. 3 and 4 of this order respectively provide for the substitution during the course of a suit of a legal representative for a deceased plaintiff or a deceased defendant; and construing the word 'suit' so as to embrace execution proceedings, R. 3 would furnish the required authority. By R. 12, however, this rule (with two others) is expressly rendered inapplicable to execution proceedings, an expression of intention on the part of the framers of

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the rules so clear that it is really unnecessary to look further. R. 10 of the same order has, however, been invoked. There has been some difference of judicial opinion [see *Sitaramaswami* v. *Lakshmi* (1) and *Narasimha Muthiah Chettiar* v. *Govindoss Krishnadoss* (2)] as to whether this rule can be applied to a transfer or devolution of interest after decree but we need not enter into that question because the words with which the rule opens, "in other cases of an assignment, creation or devolution of any interest," seem expressly intended to exclude the case of devolution by death, which, as we have already observed, is specifically dealt with in Rr. 3 and 4.

We accordingly allow the appeal and set aside the learned Judge's order. Respondent will pay the appellants' costs of appeal. Money deposited in Court to be refunded to the appellants.

A. S. V. *Appeal allowed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

(*Original Testamentary Jurisdiction.*)

PRESENT :—MR. JUSTICE KUMARASWAMI SASTRI.

Govindaswami Naidu ... *Plaintiff**

v.

Kannammal ... *Defendant.*

Govindaswami Naidu v. Kannammal.

Will—Testator's mind poisoned by unfounded allegations—Disposal of property in a manner which the testator would not have done but for the false statement—Validity of the will.

Where a person who had been enfeebled by a painful illness and had been suffering great pain for some months before he executed a will is led into the belief that his wife is neglecting him and that she and her father are only after his property, and where the testator's father and brother in order to mislead the testator into the belief that his wife is neglecting him did not write to her about his health or send her any moneys to come down to the place where the testator was, though the testator asked them to do so, and where the testator consequently conceived an unreasonable dislike to his wife and executed a will depriving her of the custody and guardianship of all their children and granting her a petty maintenance, which he would not have done if his mind towards her had not been poisoned by his father and brother, *held,* that the will is not valid.

K. V. Ramachandra Aiyar for plaintiff.

P. G. Krishna Aiyar for defendant.

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*T O S No. 11 of 1925. 4th May, 1926.

1. (1917) I L R 41 M 510.
2. (1921) I L R 44 M 919 at 929: 41 M L J 316.

Govindaswami Naidu v. Kannammal.

The Court delivered the following

JUDGMENT :—This suit arises out of an application for probate of a will alleged to have been left by one Ramakrishna Naidu who died on the 31st of January, 1925. The petitioner is the father of the testator and claims to be executor under the will. The defendant is the widow of Ramakrishna Naidu and she opposes the grant. She states that she was not aware that her husband left any will, that her husband was at the time of the alleged execution of the will an inpatient in the Surgical Ward in the General Hospital, that the will even if executed is invalid and inoperative, that the petitioner for probate and his wife were always inimical towards her and her children, that they exercised undue influence over her husband, that she and her husband were living a happy married life and that it is extremely unlikely that her husband would have voluntarily deprived her of the guardianship and custody of her five minor children and cut her off with a maintenance of Rs. 7 a month.

The following issues were settled:—

1. Was the document expounded executed by the deceased and duly attested?

2. Was the deceased in a sound disposing state of mind at the time of the alleged execution of the document?

3. To what relief, if any, is the plaintiff entitled?

I think a further issue arises as to whether the will was brought about by the exercise of fraud or undue influence.

Ramakrishna Naidu, the husband of the defendant, was employed in the Government of India as a Stenographer. For some months before his death he was suffering from the distressing complaint of spinal tuberculosis or spinal caires which prevented his getting out of bed. In fact for some months before his death he was unable to sit up and was always lying on his bed. We find from the letters which have been filed as Ex. I series that he was suffering from very great pain and that even as early as the 26th of March, the pain was so great that he swooned and fell down while attempting to go to a shop in Allahabad. In a letter dated the 24th of February, 1924 he writes to his wife about his health as follows:

"For the last three months I have been feeling great pain in my chest and stomach and I am not able to freely bend or lie down. Medicines have no effect. My right leg is also paining. By the time I finish this letter the pain on my back has become insufferable and I dare say that you will not be able to recognise me if you see me now What shall I do? If I think of taking

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leave I am oppressed with the thought of having to look after five stomachs excluding myself, which is seen going to become six including the one in your womb. Am I at least free after providing for maintenance? I have to equally provide you all with good clothes and ornaments I am at a loss to know the divine dispensation. Sweet embraces and kisses to my children and the same to you."

In the letter of the 6th March, 1924 he says :

"You had enquired what I was ailing from? I have pain all over the body ...."

In the letter of the 15th of March, he writes:

"My pain is still like before. Now my knees also are paining much. I am unable to walk. The back aches, its severity is fully known to me alone who suffers. With all this pain I am attending office work, biting the teeth."

On the 26th of March, he writes:

"Some days back I had gone to the fruit bazaar in Allahabad in the accompaniment of two Punjabi friends. All at once I felt weak and unconscious and fell down in the ground feeling only a hard blow on my head. On my regaining senses I was told by my friends that I was down for a pretty long time, in spite of their best efforts to help me. If I had died then, or if I was run over by any passing carriage I would have been relieved of these worldly miseries. I have survived this crisis, probably only to be teased by all the people who have made it a point to do so."

The diary kept by the deceased has been filed as Ex. C and we find entries therein which show that he was suffering very much. On the 28th of May, 1924 he writes in his diary

"The pain became so acute in the evening that I began to roll in the bed cursing my fate".

On the 29th he says that he spent a sleepless night and that the doctor came and thought that he had an attack of tuberculosis. He says:

"Whatever may be the opinion of doctor I am having hell of a time".

On the 30th he says that the doctor was not sure as to the exact nature of the disease, and that the pain on the back would not allow him to sit for more than a few minutes. Then he took leave and came to Madras as appears from the entry in his diary on the 12th of May. His suffering increased and he became an in-patient in the Officers' Quarters in the General Hospital. Treatment did him no good and he was taken to a place near Feroke for Ayurvedic treatment and he died on the 31st of January, 1925.

So far as the defendant is concerned the evidence shows that her health was not good. During the nine years she was living with her husband, she had six children, five of whom are now alive. It appears from the letters which I have referred to that in March 1924 she was *en ciente* and the last

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child was born in May 1924. The confinement was very difficult and she was dangerously ill some time before her husband came to Madras. A telegram was sent to her husband as to her difficult confinement but his illness prevented him from going to her. There can be little doubt from her evidence that when her husband was ill in the General Hospital her health was bad. She had five young children in her hands and she and her last child was ill. Her husband, when he came on leave and before he went to the General Hospital, went to Coimbatore and saw his wife and children. He was taking some medicine there but finding no relief he left his wife and children at Coimbatore and came down to Madras and went to the General Hospital and was admitted as an in-patient. It is not suggested that her husband had any house in Madras and I see no reason to disbelieve the evidence of the defendant that her husband asked her and the children to remain in mofussal, that he came down to Madras stating that he would put himself under treatment and return as soon as possible and that while in Madras he was an in-patient in the Officers' Quarters in the General Hospital, and had no other residence or place where his wife and children could stay if they came to Madras. The petitioner is the father of the testator. The testator had a brother called Narayana and his mother was also alive. The evidence of the defendant and of Kesavalu Naidu, a friend of her husband, who is a retired Supervisor in the Military Accounts Department shows that the feelings between her husband's parents and the defendant were not at all friendly. Her husband rose from a small beginning and as is not uncommon in Hindu families, the parents resented any great affection which was shown by the husband to the wife. The letters Ex. I series also show that the defendant was not pulling on well with her husband's parents. The defendant states that after her husband came to the Hospital in Madras and she was in mofussal, she did not receive any communication from her husband or his parents, that she was ill as also her last child, that she came to Madras about the 11th or 12th of November, 1924 accompanied by her father, that when she saw her husband he asked her where the children were, and she said she had left them with her junior paternal uncle, that she asked him about the absence of letters and he said that he had sent letters and money and she did not come to Madras all these days when he was ill and so on, that she said that she had received no letters or money and nobody informed her about his health, that

she wrote to Kesavalu and on coming to know of his health she came to Madras, that her husband said he would make enquiries of his younger brother Narayana and let her know, that he said that he asked his brother whether he sent any letters or money to her and the brother gave no reply, that she remained in Madras for five days, and was taking meals in a hotel and going to the hospital, that her husband's parents never made any enquiries about her or invited her to come and stay with them, but that on the contrary when they saw her they abused her and asked her why she came there, that after she was for five days in Madras her husband said that her health was not good and the child was ill and asked her to go back, that during the time she was in Madras her husband never told her about any will he had executed or that he had any intention to execute one and that she went back to mofussal at her husband's request. Kesavalu Naidu, who is a respectable witness, states that he did not know that the defendant's husband was in the General Hospital and that when he went to see a relation of his who was ill there he found that Ramakrishna Naidu was seriously ill. He says that he received a letter from the defendant enquiring about the welfare of her husband and as to how many months he would have to stay in the hospital, that he went to the hospital and showed his wife's letter to the testator, that the testator read it and said that he had made proper arrangements with his brother Narayana to send her money for maintenance and also write to her, that on seeing the letter of his wife the testator thought that his brother might have disappointed them, that the parents of the testator were there at the time and on seeing the testator read the letter they asked him whose letter it was and he said it was a letter from his wife and they said it was a useless letter and asked him not to talk much and said that the doctor would be annoyed and that he then left. He also says that when defendant's father-in-law brought her from Coimbatore to Delhi and stayed in Calcutta where the witness was then employed he found that the defendant had been starving four or five days and had received no attention whatever.

On the 11th of November, 1924, about a week before the execution of the will we find the following entry in the diary kept by Ramakrishna :.

"My wife and father-in-law came to see me. From my wife's behaviour it appeared that she came to Madras not so much to see me and attend upon me but to get more money from me. When she came she brought with her only the last born babe, leaving the other children at Sennimalai. When question-

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ed why she did not bring all children with her, she could not give me a satisfactory reply. When she came to see me in hospital her father also followed her but instead of coming into my room he used to go to Mr. Doraiswami Mudaliar who was undergoing treatment in the next room and spoke ill of my parents. *Ex parent.* My father-in-law is said to have declared that 'so long as he lived he won't allow his daughter to live with me in the midst of my parents, though Mr. Doraiswami Mudaliar advised him to the contrary."

On the 15th we find the entry—

"They left the place abruptly My father-in-law did not even take leave of me."

On the 16th we find the following entry—

"Wife and father-in-law left Madras for Sennimalai."

There are no entries on the 17th and 18th and on the 19th we have this entry—

"The will was executed to-day."

There can be no little doubt that shortly before the execution of the will the testator thought that his wife did not care for him but rather wanted his money in anticipation of his death and that her father was vilifying his parents and himself and did not attend on him. Now it is clear from the letters written to the defendant and the money order coupons that have been produced that till he came to General Hospital he was on very affectionate terms with his wife. She had borne him six children and the letters which he wrote to her in March before he came to Madras breathe great affection for her and the children. He states that even though he was suffering very much he did not want to take leave because he thought he may not be able to keep his wife and children in comfort. He talks of a present which he was buying for her and which would come to her as a surprise gift. On reading the letters it is impossible to hold that till he came to Madras for treatment he had the slightest cause for being dissatisfied with his wife. Unfortunately when he came to Madras for treatment his wife was also ill. She had a very difficult delivery a short time before and both she and the child were suffering very much and as the husband had no house in Madras and as he was going to the General Hospital for treatment I see no reason to doubt the statement of the defendant that when he left Coimbatore for Madras for treatment in the General Hospital he asked her and the children to remain in mofussal and said that he would get treated and come back. The only relations who were with the testator in Madras were his father, mother and brother. I have little doubt on the evidence in this case that they were not well disposed towards

the defendant. It also appears from the evidence that though Narayana was asked by the testator to write to his wife and to send money to her he did nothing, and the testator who had no reason to think that his brother was not complying with his wishes probably thought that his wife was neglecting him and he was encouraged in this belief by his father and brother.

Turning to the terms of the will I cannot help remarking that it is an extremely harsh and cruel will. His wife is deprived of the custody and guardianship of all her children. As regards the children under five years of age she is to keep the children until they attain their fifth year and hand them over to his parents or brother. She is to get a maintenance of Rs. 7 a month should she live separately and she is to receive Rs. 5 if she lived with his parents. It appears from his own letters written to his wife that the feelings between his wife and his parents were not cordial and he must have known what miserable life she would lead after his death if she had to live with his parents. She was left with the choice of either leading a miserable existence in their house or live apart separated from her children. I find it difficult to conceive of a greater refinement of cruelty than is contained in the provisions of this will. Now, regard being had to the affectionate terms which existed between the wife and the husband before the husband left Coimbatore to come to Madras for treatment I can only account for the sudden change which came over him when he executed the will by the unfounded suspicion that had been created in his mind that his wife was not caring for him but that she came to Madras for getting money from him and make sure how long he will last. It should be remembered that at the time of leaving the will and some months before that he was suffering acutely. For some months before he executed the will it is admitted that he was not able to get up from bed. Spinal tuberculosis rendered it impossible for him even to sit up. He had to do everything in bed. Even before he took leave he was extremely weak and suffering a great deal and the few months that intervened between his coming to Madras and leaving the will must have rendered his position extremely miserable. I have little doubt that this position must have been known to be hopeless almost about the time when he left the will. I see no reason to disbelieve the evidence of the defendant and Kesavalu Naidu and I think it is clear that the father and the brother of the testator influenced him against his wife by suggesting that she did not care for

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him and that in order to estrange them the father and brother did not write to her about the testator's health or send her any money although the brother was asked to do so by the testator. They have not ventured to go into the box and contradict the evidence given against them and on this part of the case I think the evidence and probabilities show that for their own ulterior purpose they prejudiced the testator against his wife.

As regards the terms of the will although the plaintiff derives no direct benefit under the will, they have the control over the property left by the deceased amounting to Rs. 10,670-0-0, and the custody and bringing up of the children so that it is obvious that they would maintain themselves and the children with the income. There is also a legacy of Rs. 500 to the testator's sister and Rs. 500 to Narayana, his brother.

It is significant that in his diary the testator states that his father-in-law had declared that so long as he lived he would not allow his daughter to live with the testator in the midst of his parents and that he was also vilifying him. This was not said in his presence and somebody must have invented this story to prejudice him against his wife and her father. He says that his father-in-law was speaking ill of his parents. Here again somebody must have told him this story, and as only his parents and brother were with him it is extremely probable that they prejudiced him by trying to make out that both his wife and her father were after his property and did not care for him. It is easy to see what the effect of all this would be on a chronic invalid like the testator who had to spend almost all his time in bed and in constant severe pain. It may be that his intellect was not clouded but he must have been weak and amenable to suggestions of the kind made to him that his wife was not going to see him was due to her indifference and the aversion he suddenly took was due to the machinations of the parents and brother of the deceased. There is no reason why the defendant who was in affectionate terms with her husband would not have come to see him if she was kept informed of his health. On the evidence and probabilities I have no hesitation in coming to the conclusion that the testator and his wife were on very affectionate terms till the testator came to Madras for treatment, that he was suffering very much for some months before he executed the will, that he was extremely feeble in body and that taking advantage of these facts his parents and brother who were not well disposed to-

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wards the defendant prejudiced him very much against her and suggested the idea that he was being neglected by those who ought to be near him.

As regards the exact state of his health in the hospital at the time the will was executed the plaintiff has adduced no medical evidence. The only evidence adduced by the plaintiff is that of Viswanatha Sastri, a vakil of this Court and Kalyana Chetty, who is an attesting witness to the will Viswanatha S...

NOTE TO BINDER.

Substitute pages 755 & 756 for corresponding pages in the previous part.

...testator's father and mother were present and that the particulars for the preparation of the will were given by all of them. Plaintiff's second witness Kalyana Chetty says that he was present at the time of the execution of the will and attested the will and saw the other witnesses also attest the will and that he identified Ramakrishna Naidu before the Sub-Registrar. He says that the testator was in sound state of mind when he dictated the terms of the will. He says that the testator told him that he was not happy with his wife because she did not attend on him during his illness. He admits that the deceased was unable to sit up and that he was able to write only lying on his back. On this evidence there can be no doubt that the will was executed by the deceased. But the question is whether, where a person who had been enfeebled by a painful illness and had been suffering great pain for some months before the will was executed is led into the belief that his wife was neglecting him and that she and her father are only after his property and where the testator's father and brother in order to mislead the testator into the belief that his wife is neglecting him did not write to her about his health or send her any moneys to come down to Madras though the testator asked them to do so, the will executed by the testator who conceives

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an unreasonable dislike to his wife brought about by the machinations of those who were near him can be valid. I am unable to bring myself to hold that such a will is valid. I find it difficult to resist the conclusion that the parents and the brother of the deceased who were not on good terms with the wife of the deceased purposely refrained from writing to her about his health and sending any moneys to her though the testator wanted his brother to do so and that they prejudiced the testator against his wife by telling him that his wife was neglecting him and that even after she and her father came to Madras the testator's mind as appears from the diary was poisoned against her by telling him that his father-in-law was speaking ill of his father and was stating that he would not allow his daughter to live with the testator's parents. The entries in his diary on the 11th and 15th of November shows that he must have been prejudiced against her by statements said to have been made by others. The petitioner who is the father of the testator and the testator's brother did not venture to give evidence and I have little doubt that they did their best to poison the mind of the testator against his wife and that through no fault of hers. She was the victim of an unreasonable dislike created by the plaintiff. Under these circumstances I cannot bring myself to uphold this will.

Various authorities were referred to by both sides. For the plaintiff it is argued that there should be coercion in the strict sense in order to invalidate the will and that mere influence gained by one over the other and the execution of the will under such influence could not invalidate the will. Reference has been made to *Wingrove* v. *Wingrove* (1) where it was held by Sir James Hannen that in order to constitute undue influence in the eye of law there must be coercion; to *Bandains* v. *Richardson* (2) where it was held that though influence may be degrading and pernicious yet it would not be undue influence in the eye of the law and to *Pilkington* v. *Gray* (3) where it was held that testamentary capacity is not disproved by evidence of the testator's merely eccentric acts and conduct.

For the defendant it is argued that in order to constitute sound testamentary capacity the testator must be in a position to realise the claims which his wife and children have on him and that where his mind has been poisoned by unfounded allegations of misconduct and he disposes of property in a manner which he would not have done but for the false statements made to him by those near him regarding his wife whom he

1. (1885) 11 P D 81. 2. (1906) A C 169. 3. (1899) A C 401.

was previously on good terms, the will cannot be said to have been executed by him while of sound disposing mind. Reference has been made to section 61 of the Indian Succession Act, 1925, which states that a will or any part of a will, the making of which has been caused by fraud or coercion, or by such importunity as takes away the free agency of the testator, is void, and it is argued that in the present case the conduct of the plaintiff and the testator's brother would bring the case within that section. Reference has also been made to *Deub v. Clark and Clark* (4) and *In re Charles William Peek* (5). I can see nothing in the authorities cited by the plaintiff's vakil which on the facts I have found proved constrains me to grant probate. I am of opinion that the will is not valid and dismiss the application for probate with costs. (Govindaswami Naidu v. Kannammal.)

N. S. *Application dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—SIR C. V. KUMARASWAMI SASTRI, *Kt.*, *Offg. Chief Justice* AND MR. JUSTICE CURGENVEN.

Bobbaladi Gateppa, minor, by next friend Andragal Adeppa ... *Appellant** (*Plaintiff*)

v.

Bobbaladi Eramma and others ... *Respondents* (*Defendants Nos. 1 to 8*).

Jains—Applicability of Hindu Law—Presumption—Adoption by Jain widow—Consent of husband or his sapindas, whether necessary. (Gateppa v. Eramma.)

In the case of Jains there is a presumption that they are governed by ordinary Hindu Law unless it is shown that by custom a different law prevails among them. Consequently the consent of the husband or his sapindas is necessary to validate an adoption made by a Jain widow in the absence of a custom to the contrary. *Peria Ammani v. Krishnaswami*, (1892) I L R 16 M 182: 3 M L J 109 referred to.

Appeals against the decree of the Court of the Subordinate Judge of Bellary dated 1st September, 1922 in O. S. Nos. 56, 59 of 1921 and 130 of 1920 and 34 of 1921.

C. Sambasiva Rao for appellant.

P. Venkatramana Rao and *V. S. Narasimhachari* for respondents.

The Court delivered the following

JUDGMENTS:—*The Officiating Chief Justice*:—The only question in these appeals is whether the consent of the husband (Kumaraswami Sastri, Offg. C. J.)

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*Appeals Nos. 422, 432 and 435 of 1922 and Appeal No. 394 of 1923. 13th August, 1926.

4. 3 Add 79: 162 E R 410. 5. 2 Sw. & Tr 505: 164 E R 1093.

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or his sapindas is necessary to validate an adoption made by a Jain widow. The Lower Court held that the Jains are governed by Hindu Law in the absence of proof of any custom to the contrary and that the adoption is invalid as no consent was obtained either from the husband or his sapindas. The finding of fact as to the absence of consent is not disputed before us. The main argument of Mr. Sambasiva Rao who appears for the appellants is that so far as the Jains are concerned no consent is necessary and that the Lower Court is wrong in thinking that the Hindu Law applied to them. Were the matter *res integra* I would be inclined to hold that modern research has shown that Jains are not Hindu dissenters but that Jainism has an origin and history long anterior to the Smritis and commentaries which are recognised authorities on Hindu Law and usage. In fact, Maha Veera, the last of the Jain Theerthankars, was a contemporary of Buddha and died about 527 B. C. The Jain religion refers to a number of previous Theerthankars and there can be little doubt that Jainism as a distinct religion was flourishing several centuries before Christ. In fact Jainism rejects the authority of the Vedas which form the bedrock of Hinduism and denies the efficacy of the various ceremonies which Hindus consider essential. There is a great force in the observations of Holloway, J., in *Rathams Lall* v. *Soojan Mull Lall* (1) that Hindu Law cannot be applied to them. So far as Jain law is concerned it has its own law books of which Bhadrabaku Samhit is an important one. Vardhamana Niti and Ashana Niti by the great Jain teacher Hemachandra deal also with Jain Law. No doubt by long association with Hindus who form the bulk of the population Jainism has assimilated several of the customs and ceremonial practice of the Hindus but this is no ground for applying Hindu Law as developed by Vignaneswara and other commentators, several centuries after Jainism was a distinct and separate religion with its own religious ceremonial and legal systems, *en bloc* to Jains and throwing on them the onus of showing that they are not bound by the law as laid down by Jain law-givers. It seems to me that in considering questions of Jain law relating to adoption, succession and partition we have to see what the law as expounded by Jain law-givers is and to throw the *onus* on those who assert that in any particular matter the Jains have adopted Hindu Law and custom and have not followed

1. 9 Mad Jurist 21.

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the law as laid down by their own law-givers. I have not been referred to any Jain law-giver requiring consent of the husband or sapindas to enable a widow to adopt. Several Jain communities have successfully shown the custom of adoption without consent being valid. The absence of any necessity for consent was probably due to no consent having been required by the Jain law-givers. I see nothing in the Bhadrabahu Samhita requiring any consent (*see* trans. Bhadrabahu Samhita by J. L. Haini, M. A., Judge, High Court, Indore). As regards Bhadrabahu Samhita, verse 40 empowers a sonless man or woman to take a boy in adoption. Verse 83 empowers a widow to adopt a boy and make over her property to him. Verse 73 runs as follows:

"The virtuous lady may like her husband take to herself a son of a good gotra and instal him on the estate of her husband"

In *Maharaja Govinda Nath Ray* v. *Gulab Chand* (2) decided as early as 1833 the pandits consulted were of opinion that according to Jain Sastras a widow had power to adopt without any authority from her husband. There was some difference of opinion if she could depose an adopted son. They refer to Jain Sastras and there is no suggestion that the law applicable to them is the Hindu Law or that any special custom was necessary to be alleged and proved to support an adoption by a widow without consent of her husband or sapindas. There is a great force in the argument of Mr. Sambasiva Rao that it is for those who contend that the consent of the husband or his sapindas is necessary to prove that the Jains have in the matter of adoption followed Hindu Law. The matter, however, in my opinion is concluded by authority and a series of decisions extending over several years have held that the presumption is that the Jains are governed by ordinary Hindu Law unless it is shown that by custom a different law prevails among them.

In *Chotay Lall* v. *Chunnoo Lall and others* (3) decided in 1878 their Lordships of the Privy Council held that the ordinary Hindu Law of Inheritance should apply to Jains in the absence of any proof of special custom varying it. Their Lordships in dealing with the argument of Mr. Cowell that Jains should be presumed to be governed by their customs differing from ordinary law, and referring to the case of *Sheo Singh Rai* v. *Dakho* (4) observed that the case *Sheo Singh Rai*

2. (1833) 5 S D A 276. 3. (1878) I L R 4 C 744: 6 I A 15 (P C).
4. (1878) I L R 1 A 688 (P C).

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v. *Dakho* (4) did no more than adopt and affirm the law to be deduced from a roll of cases in India, that when the customs of the Jains are set up they must be proved like other custom varying the ordinary law, and that, when so proved, effect should be given to them. In *Sheokuarbai v. Jeoraj* (5) their Lordships of the Privy Council observe:

"The Jains are Hindu dissenters, and although, as was pointed out by Mr. Mayne in paragraph 46 of his Hindu Law and Usage, generally adhering to the ordinary Hindu Law, that is, the law of the three superior castes, they recognise no divine authority in the Vedas and do not practise the Shradh, or ceremony for the dead."

The due performance of the Shradh, or religious ceremonies for the dead, is at the base of the religious theory of adoption, but the Jains have so generally adopted the Hindu Law that the Hindu rules of adoption are applied to them in the absence of some contrary usage (Mayne's Hindu Law, paras. 148 and 106, and cases there cited). In *Musammat Mandit Koer v. Phool Chand Lal* (6) it was held that unless a custom to the contrary is proved, Jains are governed by the Hindu Law of Inheritance and ordinarily the Mitakshara school of law would be applicable to them. In *Bachebi v. Makhan Lal* (7) it was held that the ordinary Hindu Law of Inheritance would apply to Jains in the absence of proof of custom or usage varying that Law. The learned Judges treated the question as well settled and referred to the decision of their Lordships of the Privy Council in *Chotay Lal v. Chunnoo Lall* (3). The same view was taken as early as 1867 by Sir Barnes Peacock, C. J., and Jackson J., in *Lalla Mohabeer Pershad and others v. Musammat Kundun Koowar* (8) where the learned Judges held that the Jains are governed by the Hindu Law of Inheritance applicable in that part of the country in which the property is situate. In *Asharfi Kunwar v. Rup Chand* (9) the learned Judges take it that the law as laid down by their Lordships of the Privy Council is that in Jain cases it rests on the party alleging a custom or practice at variance with that of orthodox Hindus to prove his allegation and they throw the onus on him of showing the custom that a widow can adopt without the permission of her husband, though on the evidence they held that custom proved. In *Peria Ammani v. Krishna-*

3. (1878) I L R 4 C 744: 6 I A 15 (P C).
4. (1878) I L R 1 A 688 (P C).
5. (1920) 25 C W N 273 (P C).
6. (1897) 2 C W N 154. 7. (1886) I L R 8 A 55.
8. (1867) 8 W R 116. 9. (1908) I L R 30 A 197.

swami (10) it was held by Muthuswami Aiyar and Best, JJ., that the onus lay on the party asserting to show that among the Jains a widow could adopt without permission from her husband or his sapindas, and that the custom which was set up was not proved.

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Reference has been made to authorities in Bombay but they do not afford much assistance as according to Mayukha no permission of the husband or his sapindas is necessary for a widow to adopt. I may, however, point out that in *Bhagwandas Tej Mull* v. *Rajmal* (11) it was held that adoption amongst Jains was regulated by the ordinary Hindu Law as was their succession to their property generally and that it was for the Jains to allege and prove any custom, which was different from the normal Hindu Law and usage in the country in which the property is located and the parties reside.

Cases have been referred to where among special sects of Jains Courts have held that a custom has been proved whereby authority to adopt is unnecessary. [See *Lakhmi Chand* v. *Gatto Bai* (12), *Manohar Lal* v. *Banarsi Das* (13), *Asharfi Kunwar* v. *Rup Chand* (9) and *Harnabh Pershad* v. *Mandil Das* (14).]

The argument of Mr. Sambasiva Rao is that there is such a general agreement as to usage not requiring consent in other parts of India that we may presume that there is such a usage among the Jains in the Madras Presidency. I do not think that having regard to the various sects in which the Jains are divided there can be any general presumption as contended for by Mr. Sambasiva Rao. In fact so far as the Jains in the Madras Presidency are concerned the usage was negatived in *Peria Ammani* v. *Krishnaswami* (10). In the present case there is no evidence of any custom among the Jains in the Bellary District and little help is afforded by the fact that this family migrated from the Nizam's Dominions as there is nothing to show that in the Nizam's dominions the customary law among the Jains is that permission is not necessary.

The appeals fail and are dismissed with costs.

Curgenven, J. :—The question in all these four appeals is whether the widow of a Jain is competent to make an adoption without having received her husband's consent or the con- Curgenven, J.

9 (1908) I L R 30 A 197.
10 (1892) I L R 16 M 182 : 3 M L J 109.
11 (1873) 10 Bom H C R 241
12. (1886) I L R 8 A 319.
13. (1907) I L R 29 A 495.
14. (1899) I L R 27 C 379.

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sent of the sapindas. Padmanna, a Jain and resident of the Bellary District, adopted Somanna. The father and the adopted son traded in partnership and acquired property. Padmanna made a will leaving some of his property to his wife Viramma for her life and the remainder to Somanna. Somanna pre-deceased Viramma leaving a widow Maremma; and the two widows engaged in a dispute about the property. Maremma relinquished her rights for a certain consideration, but subsequently purported to adopt one Gateppa, admittedly without any authority from her husband and without the sapindas' consent. Appeal No. 422 of 1922 arises out of a suit by Gateppa against Eramma, Maremma and others to establish the validity of his adoption. Appeals Nos. 432 and 433 of 1922 and 394 of 1923 relate to suits by Eramma to recover certain moneys, the adoption being put forward in response to her claims.

We know nothing of Padmanna's antecedents except from the statement of one witness, that he migrated to Bellary from the Nizam's dominions. But, even if this statement be accepted, it affords no help in deciding the question in issue, since no evidence has been offered as to the usage of Jains in those dominions. Indeed, no evidence of usage has been given at all, so that it lies upon the party asserting the validity of the adoption to establish that it is a part of the Jain Law that an adoption might be so made. It must be shown that there is a usage so universal as to have the force of law.

The only reported case of this Court, *Peria Ammani* v. *Krishnaswami* (10), related to Jain converts in Tanjore and the circumstances were perhaps special. The plaintiff was put to the proof of the custom and it was held on the evidence that he had failed to prove it. Best, J., in whose judgment Muthuswami Aiyar, J. concurred, pointed out that the Jains are seceders from Brahminical Hinduism but that they retained many of the customs of the orthodox Hindus, so that where a custom different from the ordinary Hindu Law is set up as prevailing among Jains, the burden of proving such a custom is on those who allege it, and in the absence of such proof the ordinary law must prevail. The course taken by decisions in Allahabad is in full agreement with this decision. The earliest of those cases relates to a sect of Jains known as

10. (1892) I L R 16 M 182: 3 M L J 109.

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Saraogi Agarwalas and came before the Privy Council in *Sheo Singh Rai* v. *Dakho* (4). Their Lordships' judgment shows that the position adopted by the High Court and approved by themselves was that

> "when amongst Hindus (and Jains are Hindu dissenters) some custom different from the normal Hindu Law of the country in which the property is located and the parties resident is alleged to exist, the burden of proving the antiquity and invariability of the custom is placed on the party averring its existence."

The evidence of the representative Jains was therefore taken, and upon this evidence it was found that the widow of a Saraogi Agarwala Jain enjoys the right of adoption without the permission of her husband or the consent of his heirs. In the next case, *Lakhmi Chand* v. *Gatto Bai* (12), it appears to have been accepted without contest that a Saraogi Jain widow may so adopt. The chief question arising in *Manohar Lal* v. *Banarsi Das* (13) was whether a Jain widow might adopt a married man to her husband. The judgment of Stanley, C. J. and Burkitt, J. contains an instructive summary from the works of various writers on the Jain religion. The conclusion was again drawn that the Jains are Hindu dissenters, and are governed by the Hindu Law of Adoption except in such respects as any different usage that may be proved. Hence, upon the question raised in that case it was necessary to take evidence of the usage alleged by proving a number of instances in which such adoption had been made; and these instances were held to establish the usage. The same question came before the same two Judges in *Asharfi Kunwar* v. *Rup Chand* (9), and was disposed of in the same way. They quoted the ruling of the Privy Council that in Jain cases it rests on the party alleging a custom of practice at variance with that of orthodox Hindus to prove his allegation. In disposing of the appeal against that judgment the Judicial Committee took occasion again to give expression to this principle, adding—

> "The question in the present case was and is whether a custom applicable to the parties concerned authorising the adoption of a married boy has been established. This is, strictly speaking, a pure question of fact determinable on the evidence given in the case."

These observations apply equally to a contention that a widow may adopt without authorisation. The same principle

4. (1878) I L R 1 A 688 (P C).
12. (1886) I L R 8 A 319
9. (1908) I L R 30 A 197.
13. (1907) I L R 29 A 495.

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was accepted by their Lordships of the Privy Council in *Chotay Lall* v. *Chunnoo Lall* (3) where referring to *Sheo Singh Rai* v. *Dakho* (4) they observe :

> "The effect of that case is that the customs of the Jains, where they are relied upon, must be proved by evidence, as other special customs and usages varying the general law should be proved, and that in the absence of proof the ordinary law must prevail."

This principle was also found in an early Allahabad case, *Bachebi* v. *Makhan Lal* (7).

It is thus clear that the onus of establishing that Jain widows have power to adopt in the manner claimed lies upon the party asserting it. The nature and the amount of evidence sufficient to shift the onus must vary with the particular circumstances of the case. It may however be safely said that judicial decisions which have reference to parts of India other than the Madras Presidency are not by themselves sufficient material upon which to found an affirmative decision. That could only be so if the usage were so invariable as to have become a part of the Jain Law. No doubt, as was held in *Harnabh Pershad* v. *Mandil Das* (14), judicial decisions recognising the existence of a disputed custom among the Jains of one place are very relevant as evidence of the existence of the same custom among the Jains of another place, but as that case equally shows, the evidence that the usage has application to the particular case cannot be dispensed with. It is certainly not yet possible to accept the view that this custom has so often been found to exist that the onus is now shifted on to the person who denies it. The Madras Presidency, where the single reported ruling is against such a custom, cannot be the first place in which such a doctrine should be accepted. In the absence of any evidence of local usage, therefore, it must be concluded that the adoption was not validly performed.

N. S. *Appeals dismissed.*

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3. (1878) I L R 4 C 744: 6 I A 15 (P C).
4. (1878) I L R 1 A 688 (P C).
7. (1880) I L R 3 A 55.
14. (1899) I L R 27 C 379.

[FULL BENCH.]

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—SIR MURRAY COUTTS TROTTER, *Kt.*, *Chief Justice*, MR. JUSTICE RAMESAM AND MR. JUSTICE BEASLEY.

Ramalinga Mudaliar (died) and others ... *Appellants** (*Defendants*)

v.

S.R. Muthuswami Aiyar and Sons, through one of its partners S.R. Muthuswami Aiyar ...*Respondents* (*Plaintiffs*).

F. B.

Ramalinga Mudaliar *v.* Muthuswami Aiyar and Sons.

Interest—Contract for the supply of goods—Contract not performed—Suit to recover money advanced—Interest whether can be awarded.

Per Chief Justice and Beasley, J. (*Ramesam, J. dissenting*):—In a suit to recover money advanced towards a contract for the supply of goods on the ground that the contract was not performed, the plaintiff is not entitled to interest from the date of the advance when the contract did not provide for it and when no demand was made prior to suit.

Appeal against the decree of the Court of the First Additional Subordinate Judge of Madura in O. S. No. 19 of 1922 (O. S. No. 163 of 1921 on the file of the Court of the Subordinate Judge of Madura).

A. Krishnaswami Aiyar for *N. Chandrasekhara Aiyar* for appellants.

S. Varadachariar and *K. V. Sesha Aiyangar* for respondents.

The Court (the *Chief Justice* and *Viswanatha Sastri, J.*) made the following

ORDER OF REFERENCE TO A FULL BENCH

The Chief Justice:—I have had the advantage of perusing the judgment about to be delivered by my brother. I think that the difficulty that I feel can be shortly put as follows: This money was not payable under a contract; it was money of the buyers' in the sellers' hands, which he was bound in conscience to return, as the contract had wholly failed.

Assuming, therefore, that the matter is one not covered by the Act, can we say that equity would compel the seller not merely to return the money, but to pay interest? No English Court would award interest on such a cause of action so far as I know, and it seems to me inconsistent with the nature of the remedy. However, as the matter is one of constant recurrence, and as the two recent Madras authorities, *Rajah of Pittapur* v. *Ballapragada Pallamraju* (1) and *Abdul Saffur Rowther* v. *Hamida Bivi Ammal* (2), are not very easy to reconcile entirely, I think it will be best to refer the matter to a Full Bench.

Viswanatha Sastri, J.:—Appeal by defendants against the decree of the First Additional Subordinate Judge, Madura, in O. S. No. 19 of 1922.

*Appeal No. 202 of 1923. 7th May, 1926.

1. (1920) 40 M L J 18. 2. (1919) I L R 42 M 661: 36 M L J 456.

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The suit was for the recovery of Rs. 10,538-7-0 being the amount of principal and interest due in respect of a yarn contract entered into on 28th August, 1918. Out of the sum claimed Rs 7,764 represents the balance of advances made on six different dates; and Rs. 2,774-7-0 represents the interest thereon at 12 per cent. per annum from 28th August, 1918 up to 16th August, 1921.

One of the questions for consideration is whether plaintiffs were entitled to claim interest for a period prior to the institution of the suit. It was urged before us (1) that the recital in Ex. A precluded the award of interest; (2) that "plaintiffs were not entitled to any interest as they made no demand prior to suit;" (3) that interest at 12 per cent. per annum ought not to have been awarded from 1st November, 1918 till date of decree; and (4) that interest at 12 per cent. per annum by way of damages was excessive.

Ex. A contains the agreement between the parties. The portion relied on runs as follows:—

"Out of the amount arrived at the rate of Rs..........per packet sold to you, at the time when the delivery of the said bales is made, we shall make deduction at the rate of Rs... ......as advance *not carrying any interest* for each bale out of the.........bales purchased."

It was contended that since the agreement stated that the advance was not to carry any interest, it was not open to plaintiffs to claim any interest. The vakil for the respondents contended that the agreement contemplated the delivery of the bales, and stated the course to be adopted in case of delivery; and that it said nothing as to interest being payable in case there was no delivery, and the advance amount had to be returned. It appears to me that the contention of the vakil for the respondents must prevail. If the contention of appellants' vakil is accepted, the logical consequence would be that plaintiffs would be precluded from claiming back the advance in case there was no delivery.

The second contention is based upon the provisions of the Interest Act, 1839. This Act introduced into British India the provisions of S. 28 of Lord Tenterden's Act (Statute 3 and 4, William IV, Ch. 42); and, according to its provisions Courts before which "debts or sums certain payable at a certain time or otherwise" were sought to be recovered, may, if they thought fit, "allow interest to the creditor at a rate not exceeding the current rate of interest from the time when such debts or sums certain were payable if such debts or sums be payable by virtue of some written instrument at a certain date, or if payable otherwise, then from the time when demand of payment shall have been made in writing, so as such demand shall give notice to the debtor that interest will be claimed from the date of such demand until the term of payment." And then comes the following proviso.—"Provided that interest shall be payable in all cases in which it is now payable by law." It was urged before us that no demand was made prior to suit; and that interest could not be awarded by way of damages apart from the provisions of the Interest Act. In support of this contention the case of *Campbell v. Williams Chard and Co.* (3) was relied upon. In that case plaintiff had on 26th March, 1921, agreed to purchase a motor-car from defendants and defendants were to overhaul the car before delivery. Two sums of Rs 1,000 and Rs. 500 were advanced on 29th March, 1921 and 20th April, 1921. At a trial run on 16th May, 1921, the car was found to be not in working order; and, on 17th May, 1921, plaintiff wrote for a refund. This was followed by a similar demand on 7th June, 1921, and, on 31st

3. (1923) 25 Bom L R 837.

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October, 1922, plaintiff's solicitors wrote to the defendants demanding a refund of Rs. 1,500 with interest at 9 per cent. The learned Judge (Fawcett, J.) held, following the case of *London, Chatham and Dover Railway Company* v. *South-Eastern Railway Company* (4), that "interest could not be awarded by way of damages apart from the special provisions of the Interest Act" and awarded interest only from 31st October, 1922.

As observed by the Privy Council in *Hurropersaud Roy* v. *Shamapersaud Roy* (5), Lord Tenterden's Act "has given rise to a great number of decisions, all of which are not easily reconcilable." This will also appear on a perusal of the judgment of Lord Herschell, L C., in *London, Chatham and Dover Railway Company* v. *South-Eastern Railway Company* (4). The same may also be said of the decisions under the Indian Act. In *Hurropersaud Roy* v. *Shamapersaud Roy* (5) the Privy Council held that independently of the provisions of the Interest Act, a decree might award interest on mesne profits from the date of the institution of the suit in which they were claimed. The proviso was held to refer "to the state of the law and the practice in India independantly of the statute." In *Hamira Bibi* v. *Zubaida Bibi* (6) the question arose as to whether or not the widow of a Muhammadan, placed in possession of her husband's estate in lieu of dower, was entitled when called upon by her husband's heirs to account for the rents and profits received by her during the period of her possession, to claim interest upon the amount of the dower. The Privy Council held that Act XXXII of 1839 had no application and that on equitable considerations she ought to be allowed some reasonable compensation which was "best calculated on the basis of an equitable rate of interest." In *Saunadanappa* v. *Shivbasawa* (7) it was held by Chandavarkar and Pratt, JJ., that where the parties were Hindus governed by the law of the Mitakshara, Courts in India may, under special circumstances, award interest by way of damages when a deposit was wrongly withheld. And this decision was arrived at on a consideration of the decision of the Privy Council in *Hurropersaud Roy Chowdhry* v. *Shamapersaud Roy Chowdhry* (5). At page 38 of the report the Lords of the Privy Council refer to the proviso and state that it refers to the state of the law and the practice in India independently of the statute." The case, *Saunadanappa* v. *Shivbasawa* (7) was referred to by Fawcett, J., in *Campbell* v. *Williams Chard and Co.* (3) and explained on the ground that the decision turned upon applying the rules of Hindu Law. In *Abdul Saffur Rowther* v. *Hamida Bivi Ammal* (2), a Bench of this Court (Ayling and Seshagiri Aiyar, JJ.) held that the Interest Act was not exhaustive of all cases where interest is allowable, and that the proviso saved cases in which it was legally allowable. In that case the suit was for a sum of money which was payable to the plaintiff (a Muhammadan lady), as and for her share on taking accounts of the business which was carried on by her father and continued by her brothers after his death, and it was held that the proviso applied. In *Arunachallam Chettiar* v. *Raja Rajeswara Sethupathi* (8) the suit was to recover from a lessee sums collected from ryots after the term of his lease had expired, and it was held following *Abdul Saffur Rowther* v. *Hamida Bivi Ammal* (2) that interest could be

2. (1919) I L R 42 M 661: 36 M L J 456.
3. (1923) 25 Bom L R 837. 4. (1893) A C 429.
5. (1878) I L R 3 C 654 at 660: 5 I A 31 (P C).
6. (1916) I L R 38 A 581: 31 M L J 799 (P C).
7. (1907) I L R 31 B 354. 8. (1921) 42 M L J 74.

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awarded on such collections by way of damages although such award may not properly be made under the Interest Act. At p. 76, Krishnan, J., says "It is true that there was no contract to pay interest, and that interest was not awardble under the Interest Act either, as there was no demand made for payment. But it is now settled that, apart from Contract and the Interest Act, it is open to the Court to decree interest by way of equitable relief in a proper case where justice, equity and good conscience require it.". In *Venkatachalam Chettiar* v. *Ponnuswami Aiyangar* (9) Wallace, J. following *Abdul Saffur Rowther* v. *Hamida Bivi Ammal* (2) held that "the Interest Act was not exhaustive of all cases in which interest is allowable."

There are three decisions of this Court where a view was taken opposed to that taken in the case in *Abdul Saffur Rowther* v. *Hamida Bivi Ammal* (2), and two of them, *Kamalammal* v. *Peeru Meera Levvai Rowthen* (10) and *Subramania Aiyar* v. *Subramania Aiyar and others* (11), have been explained by Seshagiri Aiyar, J. in *Abdul Saffur Rowther* v. *Hamida Bivi Ammal* (2) as having been cases under the Act. In *Sannadanappa* v. *Shivbasawa* (7), Chandavarkar, J., referring to *Kamalammal* v. *Peeru Meera Levvai Rowthen* (10), says that the attention of the learned Judges who decided that case was not drawn to the observations of the Privy Council in *Hurropersaud Roy Chowdhry* v. *Shamapersaud Roy Chowdhry* (5). The third case is in *Raja of Pittapur* v. *Ballapragada Pallamraju* (1) and to it Seshagiri Aiyar, J. was also a party. The suit was by a contractor to recover money payable for work done under a building contract which provided that all work done was to be paid for within a reasonable time after it had been inspected and approved; and it was held that interest could not be awarded.

Mr. Alladi Krishnaswami Aiyar referred us to several English decisions, and stated that the decision of the House of Lords in *London, Chatham and Dover Railway Company* v. *South-Eastern Railway Company* (4) precluded the award of interest. This decision was also relied upon at the bar in *Abdul Saffur Rowther* v. *Hamida Bivi Ammal* (2) and Seshagiri Aiyar, J. observes as follows at page 667:—

"The noble Lords who took part in the discussion, especially Lord Herschell, point out that there has been a course of decisions in Engand which tied the hands of Courts from awarding interest on equitable grounds, and they regretted that they were obliged on the principle of *stare decisis* to decline to re-open the question. There is no such course of decisions in this country. On the other hand the Privy Council held very early that on principles of equity, justice and good conscience which are specially referred to in the Civil Courts Act, the Courts in India are at liberty to award interest in cases not coming within the purview of the Interest Act. The Indian Courts have followed this rule for a long time. The Courts in this country therefore are not hampered in the exercise of their equity jurisdiction in the same way that the English Courts have been."

These observations were approved by Krishnan, J. in *Arunachalam Chettiar* v. *Raja Rajeswara Sethupathi* (8)

1. (1920) 40 M L J 18. 2 (1919) I L R 42 M 661 at 664: 36 M L J 456
4. (1893) A C 429. 5 (1878) I L R 3 C 654: 5 I A 31 at 38 (P C).
7. (1907) I L R 31 B 354 at 359 . 8 (1921) 42 M L J 74 at 78
9. (1924) 47 M L J 312. 10. (1897) I L R 20 M 481: 7 M L J 263.
11. (1908) I L R 31 M 250: 18 M L J 245.

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In *In re Marshall and Salt's Contract* (12) the decree was for the return of a deposit, with interest at 4 per cent. from the day when it was paid; although the agreement under which the deposit was made did not provide for interest. So also interest on the deposit amount was decreed in *In re Hargreaves and Thompson's Contract* (13). In *Startup* v. *Cortazzi* (14), where the action was in assumpsit for breach of a contract to deliver linseed, the decree was for the return of the sum advanced with interest. In *Farquhar* v. *Farley* (15), where an auction-purchaser sought to recover from the auctioneer the amount of his deposit on the ground that a good title was not made out, there was a decree for its return with interest. Gibbs, C. J. observes at page 595:—

"In many cases it has been held, that on the mere fact of one man having in his hands the money which belongs to another, interest is recoverable."

There being a conflict between the decisions of this Court in *Kamalammal* v. *Peeru Meera Levvai Rowthen* (10), *Subramania Aiyar* v. *Subramania Aiyar and others* (11) and *Rajah of Pittapur* v. *Ballapragada Pallamraju* (1) on the one hand and the decisions in *Abdul Saffur Rowther* v. *Hamida Bivi Ammal* (2), *Arunachellam Chettiar* v. *Raja Rajeswara Sethupathi* (8) and *Venkatachalam Chettiar* v. *Ponnuswami Aiyangar* (9) on the other hand and the question whether in such cases as the present, interest ought to be allowed or not being one of great importance to the mercantile community, my Lord considered it best to refer the question to a Full Bench. In this view I respectfully agree. The question referred will be:—

"In a suit to recover money advanced towards a contract for the supply of goods on the ground that the contract was not performed, is the plaintiff entitled to interest from the date of the advance when the contract did not provide for it, and when no demand was made before suit?"

The other question for consideration is whether there was any breach on the part of defendants. The contract was for the supply of two lots of 50 bales each, and the bales which defendants had to supply were to be got from third persons. These third persons were in their turn to get the bales from others and so on in regular succession till the chain reached the Madura Mills. Higher up the chain stood plaintiffs, and they defaulted to supply the bales to their vendees. It was contended that, having themselves failed to supply the bales, and the contract having been for the supply of specific goods, they made it impossible for defendants to perform the contract, and could not consequently complain of any breach of contract on the part of defendants. In a similar case (Appeal No. 459 of 1924) which came before us recently, my Lord held that each contract in the chain was to be treated as a distinct contract; and that it was no answer for the parties to it to allege a breach in the chain higher up. I agreed with the view taken by my Lord, and express the same opinion in this case also. So plaintiffs will be entitled to the refund of the advance, and the question whether they are to get interest on the sum advanced will depend on the answer to the reference.

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1. (1920) 40 M L J 18.
2. (1919) I L R 42 M 661: 36 M L J 456.
8. (1921) 42 M L J 74.
9. (1924) 47 M L J 312.
10. (1897) I L R 20 M 481: 7 M L J 263.
11. (1908) I L R 31 M 250: 18 M L J 245.
12. (1900) 2 Ch 202.
13. (1886) 32 Ch D 454.
14. (1835) 150 E R 71.
15. 7 Taunt 592.

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N. Chandrasekara Aiyar for appellants.

S. Varadachariar and *K. V. Sesha Aiyangar* for respondents.

The Court expressed the following

OPINION :—*The Chief Justice* :—But for illustration (*r*) to S. 73 of the Indian Contract Act, I should have felt very little difficulty about this case. It was a case of a sale of goods where the buyer agreed to pay considerable sums of money by way of advance before the due time for delivery of the goods and where the seller defaulted in the end and did not deliver the goods he had contracted to deliver. Under the contract the advances were merely in anticipation of the purchase price and there was no provision that interest on them should be credited to the buyer against the final adjustment. In this case the buyer has brought a suit in which he has not pressed for his ordinary remedy, namely, the difference between the contract price and the market price at the date of breach but has merely asked for the return of his deposit with interest. The question that has been referred to us is whether, if he elects such a remedy, he can have back not merely his deposit, which is not contested, but interest upon it during the time that it was in the hands of the seller.

It is not now seriously contested that if his claim for the return of his deposit as advance is to be regarded as being in any way corresponding to the common law claim for the return of money had and received to his use as on a failure of consideration, he cannot be entitled to interest. Lord Tenterden's Act, 3 and 4 William IV, Ch. 42, S. 28 obviously does not provide for such a case as this and I think it is quite clear that the Indian Interest Act of 1839 is a mere repetition for this country of the provisions of Lord Tenterden's Act.

But the plaintiff puts his case on a different ground. He puts it as a claim by way of damages flowing from the breach of contract of the seller and it is quite clear that if he has two causes of action he is entitled to pursue only one of them and give up the other, namely, the cause of action for money had and received to his use. It was practically agreed during the discussion that if the plaintiff's contention was right he would be entitled to claim damages under two heads; he will be entitled (1) to the difference between the contract and the market price, and (2) in addition, to interest in the nature of damages for being kept out of the money which he paid as

advances. If the latter claim is well founded, it cannot prejudice the plaintiff that he has not thought it worth while to pursue the former. On general principles that contention seems to me unsound, and I think one must test it on the footing that if the plaintiff was right at all he can recover damages under both these heads cumulatively although he has only chosen in this particular instance to ask under one. It appears to me that the contract having been broken, all that the plaintiff can be entitled to is to be put in the same position as if it had been carried out. Had it been carried out, he would have been in this position; he would have advanced money under the contract without interest and he would have received the goods at the contract rate. Instead, we are to deal with it on the footing that he goes into the market and has to buy corresponding goods at a higher rate. That which puts him where he ought to have been if the contract had been carried out is to get the difference between the contract price and the market price *plus* the amount of the advance that he made which *ex hypothesi* would not have borne interest if the contract had been executed. If he is to be given interest on his advance as well as the difference between the contract and the market rate, he is being enabled to put money into his pocket which he would not have had, if the contract had been carried out.

I believe the difficulty has arisen owing to the common practice of plaintiffs to abandon their proper remedy, that is, the difference between the contract and the market rate and sue only for the return of the advance. The practice arose during what is known as the speculation period when it was almost impossible owing to the suspension of business to ascertain what the market price on any given date was. In a case where a plaintiff says: "I am no doubt entitled to damages on the ordinary basis, but it is almost impossible to ascertain them and I am content to take my advance back with interest" and the defendant accepts that as a rough and ready estimate of what the damages on the ordinary basis would work out at, there is no difficulty. But I cannot see that the plaintiff is entitled to enforce such a course on an unwilling defendant. To take any other view appears to me to be giving the plaintiff not merely an indemnity but a bonus. I am, therefore, of opinion that where a plaintiff without the consent of the defendant elects only to sue for the return of his deposit giving up his claim to damages based on the difference between the contract and market rate, he cannot recover interest on his advance.

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As to illustration (*r*) to S. 73 of the Contract Act, I admit the difficulty which it creates. I am content for myself to say that it does not deal with a case of a sale of goods and that I cannot conceive that the Indian Legislature intended by so remote a side-wind to upset the settled principles of the English common law as to the measure of breach of damages in contracts of sale.

The only other difficulty that pressed upon me is the decision in *Startup* v. *Cortazzi*(14) which does look very much like an authority for the plaintiff in this case. The correctness of that decision has been questioned in such standard works as Blackburn and Benjamin and I can only say for myself that I am quite unable to understand on what principles it proceeded. I have not thought it worth while to discuss the Indian cases. They have been fully considered in the referring judgment of Viswanatha Sastri, J., and in the judgment about to be delivered by my brother Ramesam. We are really sitting here to resolve as best we can for this Court the conflicting views expressed in these cases.

I desire to point out that if the plaintiff is entitled to interest, I do not see over what period it is to be calculated. He was clearly entitled to none up to the date of breach because up to that time it was in the contemplation of both parties that the money should remain in the hands of the seller. For any period after that and before the plaintiff launched his suit it appears to me that he has himself to blame if such a period existed. By deferring the filing of his plaint he cannot cast an additional burden on the defendant. As for the period between the filing of his plaint and the determination of the suit, he is entitled to interest in the ordinary way and he will get it.

I think that the state of the case-law in this country may have misled the plaintiff as to the true nature of his remedy and that if he now desires to go to the Court below and endeavour to prove damages on the basis of the difference between the market and the contract price, he ought to be allowed to do so.

Ramesam, J.

Ramesam, J. :—The facts of this appeal are stated in the referring judgment of Viswanatha Sastri, J., and need not be repeated. The question referred to the Full Bench is, whether the plaintiff is entitled to interest on the amount advanced on a contract for sale of goods, to a refund of which he is

14. (1835) 150 E R 71.

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admittedly entitled. The appellant's contention is that under the Interest Act, he is not entitled to interest. The respondent contends first, that the matter does not fall under the scope of the Act and secondly, that, even if it does, it falls under the proviso according to which "interest shall be payable in all cases in which it is now payable by law". He contends that interest can be recovered as damages under S. 73 of the Contract Act. The Interest Act is based upon S. 28 of Lord Tenterden's Act, 3 & 4 William IV, Ch. 42. I would therefore first refer to the English Law on the question. In *De Havilland* v. *Bowerbank* (15a) and *De Bernales* v. *Fuller* (16) Lord Ellenborough, C. J., disallowed interest in actions for money had and received. These were sought to be distinguished in *Calton* v. *Bragg* (17) on the ground that the plaintiff's action in the last case was on a running account between the parties, in the course of which the plaintiff had supplied the defendant with goods, and also lent him several sums at different times. The Court held that interest is not allowable by law when money is lent generally, without a contract for it expressed, or to be implied from the usage of trade, or from special circumstances or from written securities for the payment of principal money at a given time. Lord Ellenborough, C. J. observed :

"The mere form of the count cannot make any difference in this respect, for in most cases it happens that a plaintiff may either frame his count for money had and received, or for money lent. *If interest* were due in this case, why should it not also be due where goods are to be paid for at a certain day, when that time arrives, as Baron Montagu in one of the old cases is stated to have held; or in any other case where money is to be paid at a certain day? Those cases press closely upon the present. If there were any general rule for interest to run upon money due, why should it not be allowed upon all book debts? Juries would give ear readily enough to such a direction: but I dare not vary from the practice which has long prevailed in all the Courts of Westminster Hall. If it be fit that the whole course of our proceedings in respect to giving interest should be recast, it must be done by Act of Parliament. Where one directs his agent to advance money to another, what difference can it make as to the point of interest, whether he afterwards counts for money had and received or for money lent. If interest were demandable generally upon money due, why should it have been thought necessary to introduce, as it has prevailed in practice, a particular count for interest agreed to be paid where the law would have given it without such an agreement. But in fact there has been no instance of its being allowed except upon written securities for the payment of money at a given time, or upon an express or implied agreement for it."

15a. (1807) 1 Camp 50. 16. (1810) 2 Camp 426.
17. (1812) 15 East 223: 104 E R 828.

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This was followed in *Higgins* v. *Sargent* (18). There the action was upon a policy of insurance. The next case that may be referred to is *Page* v. *Newman* (19). The action was to recover money lent. Lord Tenterden, C. J., followed the last two cases. So far all the cases relate to actions in which money was to be paid to the plaintiff as part-performance of the contract, whether it is a contract of loan or goods sold or insurance. It is at this stage that the Statute 3 and 4 of William IV was passed. The next case I would refer to is *Gosbell* v. *Archer* (20). In that case the lands of defendant were put up by him for auction. The plaintiff paid a deposit. A written memorandum of the contract was signed by the auctioneer's clerk who was held not to be the agent of the defendant. The defendant could not make out a title and the plaintiff sued to recover the amount deposited. It was held that he could not recover interest. The only question discussed by the learned Judges (Lord Denman, C. J., Littledale and Williams, JJ.) was whether the receipt given by the auctioneer's clerk fell under S. 4 of the Statute of Frauds. It was held it did not. No other question was discussed, and therefore I do not think the appellant can very much rely upon this case. As there is no contract which could be proved, there could be no breach of contract and no claim for damages. The same remarks would apply to the next case strongly relied on by the appellant, namely, *Walker* v. *Constable* (21). The plaintiff based his action on the allegation that he contracted with defendant for the purchase of an estate, the sale being by auction and that he afterwards abandoned the contract. There was also a count for money had and received. It was held he could not recover interest as the specific contract could not be proved, it not being reduced to writing and the Statute of Frauds proved an obstacle to the proof of the contract. In *Farquhar* v. *Farley* (15) the action was by a purchaser at an auction but the subject-matter of the sale was not real property but the reversionary interest in bank stock. Plaintiff sued to recover back his deposit and it was held that he was entitled to recover interest also. Gibbs, C. J. says :

"The plaintiff sues, and alleges as a part of the damage, which he says, he has sustained, that he has lost, from the time when the contract ought to have been completed the use of the sum which he had deposited towards his performance of the contract. There was a case tried before Lord Ellenborough,

15. 7 Taunt 592.
18. (1823) 2 B & C 348.
19. (1829) 9 B & C 378: 109 E R 140.
20. (1835) 2 Ad & El 500: 111 E R 193.
21. (1798) 1 Bos & Pul 306: 126 E R 919.

C. J., hardly distinguishable from the present [*De Bernales* v. *Wood* (22)]. That was an action in which the plaintiff recovered back a deposit from the auctioneer himself; so it went even further than I should have thought it necessary to carry the law in the present case. In many cases it has been held that on the mere fact of one man having in his hands the money which belongs to another, interest is recoverable."

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It is true that the last sentence of Gibbs, C. J. is somewhat indefinite and does not state any principle but the earlier sentences show that the action was regarded as one for damage for breach of contract and in this respect it was not distinguishable from *De Bernales* v. *Wood* (22), which relates to the sale of a real estate, and in which Lord Ellenborough, C. J. awarded interest as "*special damage*". It seems to me that this case is not inconsistent with the cases cited by the appellant and supports the respondent's contention that where there is a breach of contract, interest may be awarded as damages and in such a case the Act does not affect the right. The Act was not expressly referred to by the Court. Here I may refer to the very early case of *Flureau* v. *Thornhill* (23). In that case there was a sale by auction of a certain leasehold. The defendant could not make out a title. Then the defendant offered to the plaintiff his deposit with interest and costs. The plaintiff claimed a further sum as damages for the loss of the bargain. It was held that plaintiff was not entitled to any damages for the loss of the bargain. Blackstone, J., said: "If the vendor has not a good title, the return of the deposit with interest and costs is all that can be expected." The rule has been adopted in later cases, for example, in *Bain* v. *Fothergill* (24), *In re Marshall and Salt's Contract* (12) and *In re Hargreaves and Thompson's Contract* (13); in all these cases the rule of law laid down in 1776 was adhered to, but this principle that there can be no damage for the loss of the bargain is peculiar to English Law and has not been adopted in India. But this has nothing to do with the other principle adopted in the English cases according to which the deposit could be recoverable with interest. I do not think these cases can be distinguished on the ground that interest was in substitution of the damage for the loss of the bargain. I do not think it has been stated anywhere in that form. The real ground for the award of interest in all these cases is that it is a damage flowing from the breach of contract

12. (1900) 2 Ch 202. 13. (1886) 32 Ch D 454.
22. (1812) 3 Camp 258.
23. (1776) 2 Bl 1078: 96 E R 635.
24. (1874) L R 7 H L 158.

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and therefore interest can be awarded. No exception is made in S. 28 of Lord Tenterden's Act in favour of contracts relating to real estates. If the Act is to be construed as applying to damages for breach of contract also and is not to be confined to moneys recoverable on the basis of performance of a contract one has to say that the English cases decided after the Tenterden's Act were erroneously decided, but seeing *Bain* v. *Fothergill* (24), is a decision of the House of Lords, it is impossible to say so. It seems to me that the proper way of explaining the cases relating to real estate is that they did not fall within the purview of the Statute or at any rate were covered by the proviso. Therefore, in all these cases interest was recoverable as damages for breach of a contract and not on account of any peculiarity of English Law. This was the view of Lord Ellenborough, C.J., in *De Bernales* v *Wood* (22) where he relied on the former case. The next case I would refer to is *Fruhling* v.*Schroeder and others* (25). In that case a sum of money which the defendant had received for *J* and for which interest was allowed in favour of *J* was transferred to plaintiff at *J's* request. It was held that the plaintiff could not recover interest. The Court considered it as a case of money had and received and disallowed interest following *De Havilland* v. *Bowerbank* (15*a*), *De Bernales* v. *Fuller* (16) and *Walker* v. *Constable* (21). It seems to me that this case was clearly covered by the Act and cannot help the appellant in the present case. The action in that case cannot be said to be one for damages for a breach. There is no contract between the plaintiff and the defendant. In *Startup* v. *Cortazzi* (14) the suit related to damages for a breach of contract to deliver a quantity of linseed. It was held that the plaintiff was entitled to recover (1) the return of the money advanced, (2) interest on it, and (3) difference between the contract price and the price at the date of performance. It is true there are not many cases in English Reports similar to this case in which both damages for loss of the bargain and interest on the advance were given. It is also true that some remarks have been made against this case in Blackburn on Sales at pages 555 to 556 and in Mayne on Damages, 9th edition, pages 184 to 186. In the former it is said that the report was obscure, in the latter it is said that

14. (1835) 150 E R 71. 15*a*. (1807) 1 Camp 50.
16. (1810) 2 Camp 426. 21. (1798) 1 Bos & Pul 306: 126 E R 919.
22. (1812) 3 Camp 258. 24. (1874) L R 7 H L 158.
25. (1835) 2 Bing (N C) 77: 133 E R 31.

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it is difficult to find the principle. But I think what was being discussed is the question relating to the damages for the loss of bargain whether the difference should be between the contract price and the price at the date of trial or the price at the date of performance or at the date of breach. The case has been referred to without any adverse comment in Benjamin on Sales, page 1096 and in Halsbury's Laws of England, Vol. 25, page 271, section 472 and has never been judicially disapproved. But whatever doubts there may be on this question in English Law it seems to me that the principle of the case of *Startup* v. *Cortazzi* (14) was adopted as illustration (*r*) of S. 73 of the Contract Act. This illustration shows that not only the advance for the passage to Sidney and not only the difference between higher freight that the plaintiff had to pay but also the interest on the advance could be recovered. It seems to me that where a defendant breaks the contract and does not refund any advance paid to him the interest and the advance is one of the items of damage necessarily flowing from the breach. In English Law in the case of real estates it may be there is no other item of damage for loss of bargain, but in the case of other contracts in English Law and in the case of all contracts in Indian Law, the advance money and interest on it were regarded as an item of damage in addition to the difference of price. I do not see any reason to think that illustration (*r*) was not deliberately put under the Act and was a slip and that therefore we ought not to follow it. On the other hand, it seems to me to stand to common sense and shows that the decision in *Startup* v. *Cortazzi* (14) was adopted by the Indian Legislature.

The decision of the House of Lords in *London, Chatham and Dover Railway Company* v. *South-Eastern Railway Company* (4) is not against the respondent, for the case there related to sums recovered in performance of contract and was therefore covered by the Act. In that case Lord Herschell said at page 437 :

"I think that when money is owing from one party to another and the other is driven to have recourse to legal proceedings in order to recover the amount due to him, the party who is wrongfully withholding the money from the other ought not in justice to benefit by having that money in his possession and enjoying the use of it, when the money ought to be in the possession of the other party who is entitled to its use. Therefore, if I could see my way to do so, I should certainly be disposed to give the appellants, or anybody in a similar position, interest upon the amount withheld from the time of action brought at

4. (1893) A C 429.

14. (1835) 150 E R 71.

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all events. But I have come to the conclusion, upon a consideration of the authorities, agreeing with the Court below, that it is not possible to do so."

I have already said that that case was not a case of damages for breach of a contract. Lord Shand said :

"I regret that the law of this country in regard to the running of interest is not like the law of Scotland."

In *Johnson* v. *Rex* (26) Lord Macnaghten said at page 822 :

"In order to guard against any possible misapprehension of their Lordships' views, they desire to say that, in their opinion, there is no doubt whatever that money obtained by fraud and retained by fraud can be recovered with interest, whether the proceedings be taken in a Court of Equity or in a Court of Law or in a Court which has a jurisdiction both equitable and legal."

I think the principle underlying this dictum is that in such a case interest was recoverable as a damage for the fraud whether arising in contract or in tort. In that case the Crown intentionally brushed aside all questions of fraud and accepted repayment of money paid by mistake. So, no interest was allowed. It cannot help the appellant. In *In re Hargreaves and Thompson's Contract* (13) Lindley, L. J., said :

"But all such damages *as interest* and expenses of investigating the title, which, although they are called damages are matters rather for computation and taxation than for an inquiry, the Court has authority to order to be paid."

This is in consonance with the view of Ellenborough, C. J., in *De Bernales* v. *Wood* (22) and Gibbs, C. J. in *Farquhar* v. *Farley* (15). This was followed in *In re Marshall and Salt's Contract* (12).

I do not think it is necessary to discuss the Indian cases at great length. In view of Lord Davey's observations in *Ganesh Baksh* v. *Harihar Baksh* (27) it cannot be said that the observations in *Kamalammal* v. *Peeru Meera Levvai Rowthen* (10) on S. 73 of the Contract Act are final. I come to the conclusion that in all cases where there is a breach of contract on the part of the defendant and the plaintiff is entitled to damages for the breach, he is entitled to interest on any sum advanced to a refund of which he is entitled, besides any other item of damage to which he may be found also entitled. My answer to the question referred to the Full Bench is in the affirmative.

After I have written the above, I have had the advantage of perusing the judgment of my Lord the Chief Justice and while regretting I have to differ from him I wish to add a few words with reference to it. If the matter is one of purely

10. (1897) I L R 20 M 481 : 7 M L J 263. 12. (1900) 2 Ch 202.
13. (1886) 32 Ch. D 454. 15. 7 Taunt 592. 22. (1812) 3 Camp 258.
26. (1904) A C 817. 27. (1904) I L R 26 A 299 at 308-9 : 14 M L J 190 (P C).

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ascertaining the English law, I would not perhaps differ from my Lord's judgment. Even assuming that the view I have taken above of the English law is erroneous, I am of opinion that the Indian law as expounded in the Contract Act is different.

In the first place I do not see anything unreasonable in allowing the relief as an heading of damage. It is a relief in addition to the difference of prices. I do not see that giving such a relief places the plaintiff in a better position than if the contract was carried out. We are all agreed that, up to the date of performance (or breach) the plaintiff is not entitled to interest. But after the said date, when the defendant breaks the contract and does not return the money, the plaintiff has to spend other money from his pocket to get similar goods in the market. He will be out of property twice over. When he wants goods, it is reasonable he should spend their price once but when he is asked to spend twice over, I do not see the justice of depriving him of interest. I do not see that he gets any bonus in addition to indemnity. There must be some interest between the breach and suit and I do not think it is a fair answer to say to the plaintiff that he has to thank himself for the delay however reasonable it is. But I have not to find reasons for my view or to justify illustration (*r*) to the Contract Act. The illustration is there, and after the remark of Lord Shaw—*Mahomed Syedol Ariffin* v. *Yeoh Ooi Gark* (28) where he says:

> "It is the duty of a Court of Law to accept, if that can be done, the illustrations given as being both of relevance and value in the construction of the text. The illustrations should in no case be rejected because they do not square with ideas possibly derived from another system of jurisprudence as to the law with which they or the sections deal"

and Lord Atkinson in *Lala Balla Mal* v. *Ahad Shah* (29). I cannot ignore it even if I wish to. I am not able to avoid it by saying that the actual illustration relates to freight and not to sale of goods. I am not able to see any difference in principle between the two.

I agree that, in the view of the majority, the plaintiff may be given an opportunity to prove the difference in prices if he chooses to do so. I understand we are all agreed that plaintiff is entitled to interest on the deficit from the date of the plaint.

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28. (1916) 2 A C 575 at 581. 29. (1918) 35 M L J 614 at 617 (P C).

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Beasley, J. :—I have had the advantage of reading the judgment of the learned Chief Justice and am in entire agreement with it, and only desire to add a few observations with regard to illustration (*r*) to S. 73 of the Indian Contract Act and as to how far such illustration must be taken to be part of the statute because that is the only difficulty I felt about this case as interest is clearly allowable if this illustration must be taken as part of the statute.

In the first place it illustrates a remedy in damages quite contrary to the now well-settled principles of the Common Law of England with regard to the measure of damages for breach of contract for sale of goods, and secondly it does not appear to be based upon any reported or now accepted decision either in England or in India and furthermore it is not a case of breach of contract for sale of goods at all.

I can see no authority whatever for that illustration except *Startup* v. *Cortazzi* (14) which is not now good law. But the question that arises of course is how illustrations to sections of statutes are to be treated? This question has been considered in two reported cases in the Privy Council. In *Mahomed Syedol Ariffin* v. *Yeoh Ooi Gark* (28) Lord Shaw on page 581 says:

"On the second point their Lordships are of opinion that in the construction of the Evidence Ordinance it is the duty of a Court of Law to accept, if that can be done, the Illustrations given as being both of relevance and value in the construction of the text. The illustrations should in no case be rejected because they do not square with ideas possibly derived from another system of jurisprudence as to the law with which they or the sections deal. And it would require a very special case to warrant their rejection on the ground of their assumed repugnancy to the sections themselves. It would be the very last resort of construction to make any such assumption. The great usefulness of the illustrations, which have, although not part of the sections been expressly furnished by the Legislature as helpful in the working and application of the statute, should not be thus impaired."

The other case is *Lala Balla Mal* v. *Ahad Shah* (29). On page 617 Lord Atkinson says:

"Four illustrations are given. These are to be taken as part of the statute."

That is the only reference to this point in the whole of the judgment.

I do not take either judgment to mean that under every circumstance an illustration must be taken as part of the statute. All that in my view is meant is that a Court should not lightly disregard the illustrations merely because they do not

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14. (1835) 150 E R 71. 28. (1916) 2 A C 575.
29. (1918) 35 M L J 614 (P C).

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seem to be in accord with generally accepted ideas as to the law in other places.

In the present case there is no question that the illustration is in direct conflict with English decisions and is entirely opposed to the settled principles of the English law as to the measure of damage in such cases—and moreover it deals with a case of a different nature to this.

In my opinion we are not obliged to accept the illustration as stating the intention of the Legislature in a case of damages for breach of contract for the sale of goods ; and I do not feel myself bound by that illustration.

I agree with the learned Chief Justice that this claim for interest cannot be allowed.

N. S. *Reference answered in the negative.*

PRIVY COUNCIL.

(On appeal from the High Court of Judicature at Patna)

PRESENT :—VISCOUNT DUNEDIN, LORD ATKINSON AND MR. AMEER ALI.

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Saiyid Jowad Hussain v. Gendan Singh.

Saiyid Jowad Hussain ... *Appellant**

v.

Gendan Singh, since deceased, and others ... *Respondents.*

Civil Procedure Code (V of 1908), *O.* 34—*Mortgage suit—Preliminary decree in February* 1915 *for payment within six months—Mortgagee's appeal therefrom dismissed in May* 1917—*Mortgagee's application for final decree in February* 1919—*Limitation Act,* 1908, *Second Schedule, Art.* 181—*Date from which time runs for limitation.*

Where, in a mortgage suit, a preliminary decree is made for payment by the mortgagor to the mortgagee, under O. 34 of the Civil Procedure Code, 1908, of a specified sum within a certain period, and an appeal from that decree is subsequently dismissed, the time for limitation under the Limitation Act, 1908, Second Schedule, Art. 181 (*e. g.* to obtain a final decree under O. 34, R. 5) runs, not from the date fixed in the original preliminary decree for payment, but from the date of the subsequent decree of the Court of Appeal which dismissed the appeal, this latter being the only final decree.

Abdul Majid v. *Jawahir Lal,* (1914) I L R 36 A 350: 27 M L J 17 (P C) referred.

Madho Ram v. *Nihal Singh,* (1915) I L R 38 A 21 overruled.

Gajadhar Singh v. *Kishan Jiwan Lal,* (1917) I L R 39 A 641 approved.

Appeal from a decree dated the 22nd March, 1922 of the High Court (Das and Adami, JJ.) which dismissed an

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*P C Appeal No. 28 of 1924. 15th June, 1926.

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appeal from a decree dated the 30th April, 1919 of the Subordinate Judge of Gaya (R. Ghose, Esq.) made on an application for a final decree on a mortgage under O. 34, R. 5 (2) of the Civil Procedure Code, 1908.

On the 31st March, 1906, the appellant borrowed Rs. 2,500 with interest at 10 1|2 per cent. and compound interest, on the security of a mortgage of certain properties. On the 14th May, 1914 brought a suit on the mortgage-bond against the appellant in the Court of the Subordinate Judge of Gaya, claiming Rs. 52,751-3-6. The appellant contended that he had paid three sums towards the debt, viz. (*i*) Rs. 1,350 on the 8th March, 1907, (*ii*) Rs. 11,783-8-3 on the 9th October, 1907, and (*iii*) Rs. 8,127-8-0 on the 10th September, 1908, that these payments had been duly endorsed on the bond, but that the mortgagees had later erased the second and third endorsements, and accordingly allowed in the suit for the first payment only. The Subordinate Judge accepted the contention of the appellant, and on the 23rd February, 1915 made the usual preliminary mortgage-decree for payment within six months of Rs. 15,620-2-6 (including interest). The mortgagees appealed against the allowance of the said two items, but the High Court dismissed their appeal on the 21st May, 1917. It was not till the 21st February, 1919 that the mortgagees applied to the Subordinate Judge under O. 34, R. 5, for the preliminary decree to be made absolute, whereupon the appellant contended that their right to make such application was, under the Limitation Act, 1908, Sch. II, Art. 181, barred upon the expiry of three years from the 23rd August, 1915, the date fixed for payment. Both the Subordinate Judge and the High Court overruled this contention, holding that the final decree, from which time could begin to run for limitation was that of the High Court on the 21st May, 1917, which dismissed the appeal of the mortgagees from the original preliminary decree. The appellant now appealed to His Majesty in Council.

A. Majid for appellant.—The decree *nisi* having been made on the 23rd February, 1915, and payment thereby fixed for not later than the 23rd August, 1915, the time for limitation under Art. 181 of Act IX of 1908, Sch. II expires three years from the latter date. There was no application or order of any Court to stay proceedings under the decree of the 23rd February, 1915, and the mortgagees had ample time and opportunity after the High Court judgment of the 21st May, 1917 and before the 23rd August, 1918 to apply for an

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absolute decree. The High Court has confounded Art. 179 of the old Limitation Act (XV of 1877) with Art. 181 of the present Act. Art. 181 of the present Act corresponds to Art. 178 of the old Act, and Art. 179 of the old Act, which corresponds to Art. 182 of the present Act, is inapplicable to cases like the present. Further, the appeal in 1915 was not against the decree as a whole, but as against two specific items in the account, and the dismissal of the appeal did not affect the preliminary decree; the High Court did not affirm it nor had it jurisdiction to do so. Banerji, J. in *Gajadhar Singh* v. *Kishan Jiwan Lal* (1) seems to overrule his own earlier judgment in *Madho Ram* v. *Nihal Singh* (2) but it is submitted that the prior judgment is to be preferred.

A. M. Dunne, K. C. and *E. B. Raikes* for respondents referred to *Abdul Majid* v. *Jawahir Lal* (3).

15th June, 1926. The Judgment of the Board was delivered by

Viscount Dunedin.

VISCOUNT DUNEDIN :—In this case the plaintiffs were mortgagees under a registered mortgage bond granted by the defendant. They raised action for the sum of Rs. 52,000 odd, said to be due under the mortgage. The defendant denied that the whole sum was due, as he said the plaintiffs had not given him credit for two sums of Rs. 11,000 odd and Rs. 8,000 odd, which he had paid, such payments having originally been endorsed on the bond, but the endorsations having been erased by the plaintiffs.

The Subordinate Judge gave effect to this contention, but made the ordinary preliminary decree for the sum of Rs. 19,000, being the sum due, with proper computation of interest, after allowing credit for the above-mentioned two sums. The date of this decree was 22nd February, 1915. The six months of grace for payment would, therefore, expire on the 22nd August, 1915. The mortgagees appealed against the decree. The appeal was heard, and the appeal dismissed on 21st May, 1917.

On the 21st February, 1919, application was made for a final decree. The defendants opposed the application on the ground that it was time-barred under Art. 181 of the Schedule to the Limitation Act, 1908. The terms of that Article of the Schedule are: "Applications for which no period of limitation is provided elsewhere in this Schedule; period of

1. (1917) I L R 39 A 641. 2. (1915) I L R 38 A 21.
3. (1914) I L R 36 A 350: 27 M L J 17 (P C).

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limitation three years; time from which period begins to run, when the right to apply accrues."

The three years had expired or had not expired according as computation fell to be made, as the defendants urged, from the time fixed for payment by the original decree; or, as the plaintiffs urged, from the date of the dismissal of the appeal. The Subordinate Judge gave effect to the contention of the plaintiffs.

On appeal the Court of Appeal upheld the decision of the Subordinate Judge. The present appeal is against that judgment. The point, therefore, is simply whether the time runs from the expiry of the time fixed by the original preliminary decree or from the date when on appeal against that decree the appeal was dismissed.

The appellant's counsel strenuously urged that the appeal was not against the decree, but only against the items in the decree. This is a complete misunderstanding. An appeal must be against a decree as pronounced. It may be rested on an argument directed to special items, but the appeal itself must be against the decree, and the decree alone. Which date is then to be preferred? Their Lordships agree entirely with what was said by Banerji, J., in the case of *Gajadhar Singh* v. *Kishan Jiwan Lal* (1):

> "It seems to me that this rule—the rule regulating application for final decrees in mortgage actions—contemplates the passing of only one final decree in a suit for sale upon a mortgage. The essential condition to the making of a final decree is the existence of a preliminary decree which has become conclusive between the parties. When an appeal has been preferred, it is the decree of the Appellate Court which is the final decree in the cause."

These words are all the more weighty, since previously the learned Judge had in the case of *Madho Ram* v. *Nihal Singh* (2) held that when there had been an appeal against a preliminary decree, the limitation period applicable to an application for final decree ran from the expiry of the time for payment fixed by the original decree, and not from the disposal on appeal, a view which he candidly confessed in this case was erroneous. The point is put with admirable brevity by Tudball, J.:—

> "When the Munsif passed the decree it was open to the plaintiff or the defendant to accept that decree or to appeal. If an appeal is preferred, the final decree is the decree of the Appellate Court of Final Jurisdiction. When that decree is passed, it is that decree and only that which can be made final in the cause between the parties."

1. (1917) I L R 39 A 641. 2. (1915) I L R 38 A 21.

The same view was incidentally taken without comment by this Board in the case of *Abdul Majid* v. *Jawahir Lal* (3).

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Their Lordships will, therefore, humbly advise His Majesty to dismiss the appeal with costs.

Solicitor for appellant: *J. Page Thomas.*

Solicitors for respondents: *W. W. Box and Co.*

A. de M. *Appeal dismissed.*

PRIVY COUNCIL.

(On appeal from the High Court of Judicature at Fort William in Bengal.)

PRESENT:—VISCOUNT HALDANE, LORD DARLING AND MR. AMEER ALI.

Annada Prashad Das ... *Appellant* *

v.

Ambica Prashad Das and another ... *Respondents.*

P. C.

Annada Prashad Das v. Ambica Prashad Das.

Hindu will—Bequest of dwelling-house to widow for life—Execution sale of eldest son's interest therein—Widow and eldest son in occupation—Purchaser re-selling after 18 years without entering into possession—Eldest son's claim to ownership by adverse possession—Widow's title.

The will of a Hindu testator, who died in 1888, directed *inter alia* as follows:—

"My elder wife shall have the right of residence for the term of her natural life in the three-storied portion and my younger wife in the two-storied portion of my house No. 35, Ram Kamal Mukherjee's Street. I direct my executor to pay into the hands of the said Shama Churn Bose the sum of three thousand rupees to complete the unfinished portions of the three-storied portion of my said house No. 35, Ram Kamal Mukherjee's Street."

In 1898 a decree was made in a partition suit allotting to the testator's eldest son (plaintiff-appellant) the said "three-storied portion of the house" subject to the right of residence therein of the testator's eldest widow. In 1898 the eldest son's right, title and interest in the said "three-storied portion" was sold in execution of a decree against him, and the document of purchase expressed it to be subject, again, to the widow's right of residence therein for her life, and she continued thereafter, as before, in occupation with the eldest son, the purchaser not taking any steps to evict her or to occupy it.

In 1917 the purchaser re-sold the property to the testator's younger son and thereupon the eldest son instituted the present suit for a declaration of his title to the property, claiming that he had been since 1899 in possession thereof adversely to the purchaser at the execution sale, and had thereby acquired a complete title thereto against him and the new purchaser by reason of his occupation for more than twelve years. The Subordinate Judge, Alipore,

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*P C Appeal No. 182 of 1924. 18th June, 1926.

3. (1914) I L R 36 A 350: 27 M L J 17 (P C).

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decreed the suit, holding that under the will the widow only took a Hindu widow's right of residence in the part allotted to her, but that as the eldest son had also lived there, as he had the right to do with her, the title of the purchaser was extinguished before he re-sold to the younger son. On appeal the High Court (Mookerjee and Rankin, JJ.) dismissed the suit, holding that the eldest son's vested interest in "the three-storied portion of the house" was subject to the widow's right of residence therein, and that neither he nor the purchaser of his interest at the execution sale had any rights of possession during her life, any joint occupation by the eldest son being attributable to her leave and licence.

Held, affirming the judgment of the High Court, that the widow had, by the will, and quite independently of any rule of Hindu Law, the exclusive right of occupation of the property for life, and that the possession of the eldest son was by her permission, and not adverse as against the purchaser and did not affect his title, which passed by the sale to the execution purchaser.

Appeal from a decree of the High Court (Mookerjee and Rankin, JJ.) dated the 29th June, 1923, reversing a decree of the Subordinate Judge, Alipur (H.C. D. Gupta, Esq.) dated the 2nd February, 1921.

The facts are set out in the head-note and in their Lordships' judgment.

K. Brown for appellant.—The younger son's vendor had in 1917 no subsisting title to the property, for the appellant was in possession adversely to him and his vendor. The Subordinate Judge, in decreeing the declaration prayed for, rightly construed the testator's will with reference to the Hindu law as to a widow's right of residence.

L. de Gruyther, K. C. and *E. B. Raikes* for first respondent (younger son).—The appellant had not, and could not have, possession of the "three-storied portion of the house" in his own right during the lifetime of the widow and while she was in possession. Any possession which he had was not adverse to this respondent, or to his predecessor-in-title, the execution purchaser. And neither this respondent nor his predecessor-in-title had any right to possession during the widow's life.

18th June, 1926. The Judgment of the Board was delivered by

Viscount Haldane.

VISCOUNT HALDANE:—This is an appeal from a decree of the High Court at Calcutta, dated the 29th June, 1923, which reversed a decree of the Subordinate Judge of the 24 Parganas, dated the 2nd February, 1921, who dismissed the suit. The question was whether the appellant had acquired a title to certain property by adverse possession. The property consists of what has been called the three-storied portion of a house in Ram Kamal Mukherjee's Street in Calcutta. The

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house belonged to one Digambar Das, who died in 1888, leaving a will. The appellant is his eldest son, the first respondent is his younger son, and the second respondent is the appellant's mother. The question is, what was the state of the title under the will? The relevant words are these:—

"My elder wife shall have the right of residence for the term of her natural life in the three-storied portion and my younger wife in the two-storied portion of my house No. 35, Ram Kamal Mukherjee's Street. I direct my executor to pay into the hands of the said Shama Churn Bose the sum of three thousand rupees to complete the unfinished portions of the three-storied portion of my said house No. 35, Ram Kamal Mukherjee's Street."

What happened was that in 1898 there was a partition suit instituted in the High Court by the appellant, in which a decree was passed allotting to him the three-storied portion of the house, subject to the right of residence of his mother during her life. In 1899 the right, title and interest of the appellant in the three-storied portion of the house was sold in execution of a decree and purchased by one Prince Kumar Kader Meerza. The purchase was expressed to be subject to the right of residence of the widow. Before and ever since the sale, the widow has been residing in the three-storied portion of the house, and there has been no attempt to evict her or to enter into occupation by the purchaser. On the 14th Sept. 1917, the purchaser resold to the respondent, the younger half-brother of the appellant. Then the suit was brought, the basis of the claim being that ever since the purchase by Prince Kumar Kader Meerza, the appellant had been in possession of the house adversely to the purchaser and had thus acquired a complete title before the purchase by the respondent, which was more than twelve years later. The Subordinate Judge thought that all the widow took under the will was a Hindu widow's right of residence in the part allotted to her and that, therefore, the purchaser had the right to live in the three-storied portion of the house with her and that, if the appellant lived there, the title of the purchaser was extinguished before he resold to the respondent; but the High Court took a different view. They said that the question was one simply of the construction of this Hindu will, and the learned Judges, Mr. Justice Mookerjee and Mr. Justice Rankin, decided that the gift to the widow was for her life and the title of the widow was to occupy the whole of the three-storied portion of the house and that no question arose as to any other right of a widow to have a residence provided for her under the general Hindu law. What there really is is a gift which indicates the intention of the testator to allow his widow to occupy

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the whole of the three-storied portion of the house as her exclusive residence. Under the Hindu law, unlike the law of this country, there is no question of splitting up the fee simple and of creating a freehold estate for life. A nearer analogy is the law of Scotland, under which, as under the Indian law, the fee is not permitted to be split up, but a burden is created which confers a full life-interest. Here what the learned Judges have held is that as a matter of intention this widow was entitled to reside in the house and reside in it exclusively. That is very definitely stated in the judgment.

In these circumstances their Lordships think that the words of the document are such as to justify the conclusion arrived at by the two Judges in the High Court, and did not justify the conclusion arrived at by the Subordinate Judge. They will, therefore, humbly advise His Majesty that the appeal should be dismissed with costs.

Solicitors for appellant: *Theodore Bell and Co.*

Solicitors for 1st respondent: *Watkins and Hunter.*

A. de M. *Appeal dismissed.*

PRIVY COUNCIL.

(On appeal from the High Court of Judicature at Lahore.)

PRESENT :—VISCOUNT DUNEDIN, LORD ATKINSON AND MR. AMEER ALI.

Dayal Singh ... *Appellant**

v.

Indar Singh, since deceased, now represented by Kharka Singh (minor) through Musammat Bhagwani ... *Respondent.*

P. C.

Dayal Singh v. Indar Singh.

Transfer of Property Act (IV of 1882), S. 55—Agreement for sale of land—Non-registration thereof—Registration Act (XVI of 1908), Ss. 17 and 49—Admissibility thereof in evidence—Suit for specific performance—Earnest money—Purchaser anxious to complete.

Under a document, which was not registered, but which purported to be an agreement for the sale and purchase of land for Rs. 10,000, the purchaser had paid Rs. 1,000 as earnest money, and completion was to take place within forty days. The vendor eventually, notwithstanding the purchaser's constant requests, refused to complete, and, being sued for specific performance, pleaded that the document, not having been registered under S. 49 of the Registration Act (XVI of 1908), was inadmissible in evidence. The High Court being of opinion that the document did not effect a sale, but was an agreement for sale, was therefore exempt from registration under S. 17 (2) of the said Act, and accordingly decreed specific performance.

*P C Appeal No. 49 of 1924. 24th June, 1926.

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Held, assuming (without deciding) that the document was, as held by the High Court, an agreement for sale, and not a conveyance, yet, as the buyer had paid earnest money, and had been pressing for completion, which the vendor refused, it created, under S. 55 of the Transfer of Property Act (IV of 1882), an "interest in property" within the meaning of S. 17 (2) (v) of the Registration Act, 1908, and was accordingly compulsorily registrable, or, in default, inadmissible in evidence. The decree of the High Court set aside, and the suit dismissed.

Futteh Chund Sahoo v. *Leelumber Singh Doss*, (1871) 14 Moo I A 129, *Burjorji Cursetji Panthaki* v. *Muncherji Kuverji*, (1880) I L R 5 Bom 143, *Ramaswami* v. *Ramaswami*, (1882) I L R 5 M 115 and *Rani Hemanta Kumari Debi* v. *Midnapur Zamindari Company, Ltd.*, (1919) L R 46 I A 240: 37 M L J 525 (P C) referred to.

Appeal from a decree of the High Court (Broadway and Harrison, JJ.) dated the 28th March, 1923, reversing a decree of the Subordinate Judge of Lyallpur (Som Nath, Esq.) dated the 20th October, 1919.

The facts and the material part of the document referred to are set out in their Lordships' judgment.

E. B. Raikes for appellant.—The document sued on was within S. 17, Indian Registration Act (XVI of 1908), taken in conjunction with S. 55 of the Transfer of Property Act (IV of 1882), and ought not to have been admitted in evidence by the Subordinate Judge. Also, the alleged agreement was void under S. 23 of the Indian Contract Act, and S. 19 of Punjab Act (V of 1912).

The respondent was not represented.

24th June, 1926. The Judgment of the Board was delivered by

Viscount Dunedin.

VISCOUNT DUNEDIN :—On the 2nd March, 1919, Dayal Singh, the defendant-appellant, executed an agreement with Indar Singh, now deceased, but represented by the plaintiff-respondent. This agreement had for its object the undertaking of a sale of certain property, and its terms, so far as material, are as follows:—

"I, Dayal Singh, son of Jiwan Singh, caste Jat Garewal, resident and Lambardar of Chak No. 1|57, Upper Chenab, Tahsil Jaranwala, District Lyallpur, do here declare as follows:—

* * * * * *

(here follows a description of the subject)

* * * * * *

"I have agreed to sell the above-mentioned property for Rs. 10,000 and the sum of interest, to be paid to the Government, to Indar Singh, son of Hira Singh, Havildar, caste Jat Dhami, occupation cultivation, abadkar and resident of Chak No. 188, Rakh Branch, Tahsil Lyallpur, who has agreed to purchase this land merely for the sake of Lambardarship. Out of the sale money I have at present received Rs 1,000 by way of earnest money. Rs 9,000 is agreed to be received before the Sub-Registrar, Lyallpur, at the time of the completion of

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the sale and registration. The expenses, incurred in connection with the execution and completion of the sale deed, shall be borne by the vendee and myself in equal halves. I shall complete the sale in favour of the vendee within forty days, *i. e.,* before the 1st Baisakh Sambat 1976, after making a settlement of the sum of interest (which shall be deposited by the vendee) with the Government. The vendee has been put in possession of the land sold. If I do not complete the sale, I shall pay Rs 2,000 by way of damages to the vendee without any demur, and, besides, he shall be at liberty to have the sale completed by seeking legal remedy. As regards the filing of the interest, an application shall be made to the Deputy Commissioner of Lyallpur, and, on permission being granted, the vendee shall be made to deposit the said interest. If permission is not accorded the bargain of sale shall remain unaffected. The only agreement would then be that the sale would be completed after the interest was deposited. The land has, at any rate, been sold and the vendee has become entitled to it. I am simply entitled to receive Rs 9,000. I have therefore executed this agreement in favour of Indar Singh, vendee, so that it may serve as an authority. I have secured an agreement to the same effect from Indar Singh, vendee."

This document was not registered. The appellant having refused to complete the purchase, the respondent succeeding to all rights of Indar Singh, deceased, raised this action for specific performance. The appellant pleaded that the document in question being a document which needed to be registered, and not having been registered, could not be received in evidence in terms of S. 49 of Act XVI of 1908. He also pleaded that in respect of undue influence exercised at the time of the making of the agreement specific performance should be refused. The Trial Judge held that the document did not require to be registered, but held that undue influence had been proved. On appeal the Appeal Court agreed with the Trial Judge that the document did not require to be registered, but disagreed as to the other matter. They therefore decreed specific performance.

The sole question in this appeal, which is *ex parte*, is, therefore, whether the document in question required to be registered. As the question is an important one, it will be well to trace the history of the legislation which bears on the point. Act XX of 1866, S. 17, made compulsorily registrable certain instruments:—

* * * * * *

17.—(2) "Instruments (other than an instrument of gift) which purport or operate to create, declare, assign, limit or extinguish, whether in present or in future, any right, title or interest, whether vested or contingent, of the value of one hundred rupees and upwards to or in immoveable property.

(3) "Instruments which acknowledge the receipt or payment of any consideration on account of the creation, declaration, assignment, limitation or extinction of any such right, title or interest."

* * * * * *

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And, by S. 49, declared that no instrument required by S. 17 to be registered should be received in evidence in any civil proceeding in any Court unless it had been registered. The result of that enactment may be appreciated by a perusal of the case of *Futteh Chund Sahoo* v. *Deglumber Singh Doss* (1) where the Board characterised the case as a very hard one, but found that the terms of the Act were imperative. In 1877 (probably in accordance with the feeling as expressed above) in a new Act, S. 17 was repeated as before, but with this addition:—

"Nothing in clauses (*b*) and (*c*) of this section applies to

* * * * * *

"(*h*) any document not itself creating, declaring, assigning; limiting or extinguishing any right, title or interest of the value of one hundred rupees and upwards to or in immoveable property, but merely creating a right to obtain another document, which will, when executed, create, declare, assign, limit or extinguish any such right, title or interest."

This change having been made, there came to be raised questions as to various agreements, first as to whether they fell under S. 17 (*b*), and; accordingly, if they did so, whether they could be excused in respect of S. 17 (*h*). Examples of such cases may be found in *Burjorji Cursetji Panthaki* v. *Muncherji Kuverji* (2) where it was held that the agreement was not necessarily registrable, and *Ramaswami* v. *Ramaswami* (3) where the agreement was held to be compulsorily registrable, and consequently not admissible in evidence. Their Lordships do not think it necessary to review these cases or to decide whether one of them will agree with what was said by Lord Buckmaster in *Rani Hemanta Kumari Debi* v. *Midnapur Zamindari Company, Limited* (4). They will assume without deciding that taking the terms of the Act of 1877 alone (the terms of which were repeated *totidem verbis,* though not with the same numbering of the paragraphs, in the Act of 1908, which is the Act which rules this case) the judgment of the Courts below were right in holding that the present agreement was an agreement to sell and not a sale, and was consequently exempted under S. 17 (2) (*v*), which corresponds with S. 17 (*h*) of 1877. But there is another Act to be reckoned with, which unfortunately entirely escaped the notice of the Courts below, as they say nothing about it; that is the Transfer of Property Act, 1882 (Act IV of 1882) (passed, it will be observed, after the case of *Panthaki* (supra), which was in 1880). By S. 55 (*b*) the buyer is entitled:—

"Unless he has improperly declined to accept delivery of the property, to a charge on the property, as against the seller and all persons claiming under

1. (1871) 14 Moo I A 129.
2. (1880) I L R 5 Bom. 143.
3. (1882) I L R 5 M 115.
4. (1919) L R 46 I A 240: 37 M L J 525 (P C)

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him with notice of the payment, to the extent of the seller's interest in the property, for the amount of any purchase money properly paid by the buyer in anticipation of the delivery and for interest on such amount; and, when he properly declines to accept the delivery, also for the earnest (if any) and for the costs (if any) awarded to him of a suit to compel specific performance of the contract or to obtain a decree for its recission."

Their Lordships are of opinion that the section applied to the agreement in this case, where the buyer had paid earnest money, and so far from refusing to accept delivery, was pressing for specific performance, and that the agreement did in itself create an interest and therefore did not allow of the application of S. 17 (*v*). It was therefore compulsorily registrable under S. 17 and, not having been registered, was inadmissible in evidence under S. 49.

Their Lordships will, therefore, humbly advise His Majesty to allow the appeal and to dismiss the suit. The appellant will have his costs before this Board, but the costs in the Courts will remain as ordered by the High Court.

Solicitors for appellant : *T. L. Wilson and Co.*

A. de M. *Appeal allowed.*

PRIVY COUNCIL.

(On appeal from the High Court of Judicature at Allahabad.)

PRESENT :—LORD BLANESBURGH, LORD DARLING, SIR JOHN EDGE, MR. AMEER ALI AND LORD SALVESEN.

Masit-ullah and others ... *Appellants**

v.

Lala Damodar Prasad ... *Respondent.*

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Masit-ullah v. Lala Damodar Prasad.

Hindu Law—Joint family—Ancestral debts—Liability of great-grandson therefor.

Under the Mitakshara School of Hindu Law, the great-grandson, in a joint Hindu family, is liable for the debts contracted by his great-grandfather, and is therefore entitled to alienate the family estate for the purpose of discharging them. Such right and liability flows logically from the doctrine that in a Hindu family governed by this system of law, the right to ancestral property extends to four generations of the family beginning with the father or head, and his great-grandson is as much a member of his family as the son or grandson, and the obligations of the descendants are co-extensive with their rights.

The rule laid down in *Brij Narain* v. *Mangla Prasad,* (1923) L R 51 I A 129: 46 A 95: 46 M L J 23 (P C) relative to the son's liability extends, therefore, equally to great-grandsons, irrespective of whether they have received (as Hindu jurists and the Courts in India had hitherto held) or not any assets from the ancestor.

Lachmandas v. Khunnu Lal and others, (1896) I L R 19 A 26: 16 A W N 185 (F B) referred to.

*P C Appeal No. 28 of 1925. 22nd June, 1926.

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Masit-ullah
v.
Lala
Damodar
Prasad.

Appeal from a decree of the High Court (Sir G. Mears, C. J. and Piggott, J.) dated the 20th June, 1922 reversing a decree of the Subordinate Judge, Moradabad (R. C. Saksena, Esq.,) dated the 25th February, 1920.

The material facts and arguments appear from their Lordships' judgment.

L. de Gruyther, K. C. and *A. Majid* for appellants.

The respondent was not represented.

22nd June, 1926. The Judgment of the Board was delivered by

Mr Ameer Ali.

MR. AMEER ALI :—This appeal arises out of a suit brought by the plaintiff Damodar Prasad on the 19th September, 1918, to set aside an alienation effected by his father Janki Prasad on the 17th September, 1906. Damodar Prasad, the plaintiff, is a member of a Hindu family subject to the Mitakshara law, and the allegations on which he seeks to have the sale by his father set aside are, in the common form, alleged immorality of the father, jointness of the family, and the absence of necessity for the sale, which is sought to be set aside. The plaintiff made his father Janki Prasad a defendant in the suit. Originally, he was defendant No. 6, but, after the addition of the representatives of some of the vendees, who had died in the meantime, Janki Prasad was made defendant No. 11.

In his plaint the plaintiff prayed to be put in proprietary possession of the property in suit and for mesne profits. In their answer to the plaintiff's claim the defendants denied that the property was ancestral and they alleged that it was sold to them for Rs. 18,400, which was applied for family purposes, and that the alienation was valid in law and binding on the plaintiff.

The suit came for trial before the Subordinate Judge of Moradabad who, on the 25th February, 1920, held *inter alia* that the plaintiff had failed to prove absolutely the allegations made by him against his father of immorality; he held also that it had been established that out of the Rs. 18,400 over Rs. 16,000 had been applied to the discharge of ancestral debts, the payment of which was binding on the joint family of which the plaintiff was a member. He held further that Janki Prasad, the grandson of Jawahir Lal, who had contracted the debts that had been discharged out of the sale proceeds, was "competent to transfer the family property to discharge his deceased grandfather's debts which were not proved in the

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case to have been taken for any immoral purposes." He also held that Damodar Prasad, the great-grandson of Jawahir Lal, was burdened with the same obligation that lay upon Janki Prasad. But the Subordinate Judge found that, out of the consideration of Rs. 18,400 a sum of Rs. 2,000 odd was not properly accounted for, and that in respect of that amount the plaintiff was under no obligation. He found also that Janki Prasad, on the 9th July, 1907, transferred his half share in the family property to the plaintiff, his son, for a consideration of Rs. 40,000 and that, although the plaintiff was a minor at the time of this transfer, on attaining majority he ratified the transaction. The Subordinate Judge considered that this transfer had the effect of "disrupting" the joint family and that, after this transfer of 1907, the plaintiff and Janki Prasad could not be taken to be "members of a joint Hindu family owning joint property in the true sense of the word in Hindu law." He accordingly held that the sale deed impugned in the case could not be set aside as the major portion of the consideration was used in the discharge of legal debts. The only relief the plaintiff was entitled to was to have "a proportionate property released from the sale deed and only to the extent of his share." He dismissed the claim for mesne profits considering that the claim was unduly delayed. He accordingly made a decree in the following terms:—

"The plaintiff's claim is decreed for recovery of certain specified share in the property in suit."

The plaintiff appealed to the High Court of Allahabad. The learned Judges considered that the decree the Subordinate Judge had made was unworkable, and in this view their Lordships agree; but the High Court took a totally different view regarding the liability of the plaintiff in respect of the ancestral debts, for which the property had been alienated by his father Janki Prasad, and principally, in this view of the case, the learned Judges came to the conclusion that Damodar Prasad was not liable for anything more than Rs. 3,077, which was actually left in the hands of the vendees for payment to certain creditors of Jawahir Lal, and which had been proved to have been paid to these men by the vendees. The High Court agreed with the Subordinate Judge in the conclusion that Janki Prasad's transfer of 1907 to his son effected a partition between them and they accordingly made the following order in the case:—

"The result is that the plaintiff is entitled to a decree directing that he may recover possession of one-half of the property specified at the foot of the

plaint, subject to payment into Court for the benefit of the defendant's vendees of a sum of Rs. 1,561-2-6. We allow him two months from the date of this decree to pay that money into Court. If he fails to do so, his suit will stand dismissed with costs throughout. If payment is made as directed the plaintiff will be entitled to recover possession. In the view which we take regarding the nature of the suit as a whole, and its conduct in the Court below, with reference more particularly to the non-appearance of Janki Prasad in the witness-box and the numerous indications on the record that the plaintiff and his father are really hand and glove in this matter, we do not think that we ought to allow the parties any costs. The parties will, therefore, bear their own costs in this Court and in the Court below. This decree will be substituted for the decree of the Trial Court which is hereby set aside."

The defendants have appealed from the decree of the High Court to His Majesty in Council.

It is to be regretted that the respondent does not appear on this appeal. Their Lordships however have given their best consideration to the case and minutely examined the authorities.

The principal point for determination relates to the position of the great-grandson with regard to the obligation resting in a Mitakshara family on descendants to liquidate the debts of the ancestor.

It is beyond question that under the law of the Mitakshara the great-grandson is as much a member of the joint family as a son or grandson.

It is also clear that the right in ancestral property extends to four generations beginning with the father, and that this right springs from "birth" [the Mitakshara, Chapter I, verse 27; the *Viramitrodaya* (Shastri's translation, pp. 16 and 72)]. Professor Sarvadhikari in his Lectures on Hindu Law, p. 563, points out that there is absolute consensus among the commentators on the subject of the great-grandson's interest in ancestral property.

Under the law of the Mitakshara the rights of descendants are co-extensive with their obligations. Sons and grandsons are expressly declared to have controlling rights in respect of ancestral estate. Vijnaneswara in Chapter I, S. 1, verse 27 declares as follows:—

"Therefore it is a settled point, that property in the paternal or ancestral estate is by birth, although the father has independent power in the disposal of effects other than immoveables for indispensable acts of duty and for purposes prescribed by texts of law, as gifts through affection, support of the family, relief from distress and so forth; but he is subject to the control of his sons and the rest in regard to the immoveable estate, whether acquired by himself or inherited from his father or other predecessor."

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In Sec. V, v. 9, the grandson is declared to have the same right as the son.

"So likewise the grandson has a right of prohibition, if his unseparated father is making a donation, or a sale of effects inherited from the grandfather; but he has no right of interference if the effects were acquired by the father. On the contrary, he must acquiesce, because he is dependant."

Their Lordships will consider presently whether there is any difference in principle between the rights and obligations of grandsons and of great-grandsons.

Mr. Mayne, in his valuable treatise on Hindu Law, has summarised the rules of the Mitakshara relating to the rights of sons and other descendants as follows:—"The question in each case will be 'Who are the persons who have taken an interest in the property by birth?' The answer will be that they are the persons who offer the funeral cake to the owner of the property. That is to say, the three generations next to the owner in unbroken male descent. Therefore, if a man has living sons, grandsons and great-grandsons, all of these constitute a single co-partnership with himself. Every one of these descendants is entitled to offer the funeral cake to him and therefore every one of them obtains by birth an interest in his property." And the author then proceeds to add "the sons of the great-grandsons would not offer the cake and therefore are out of the co-partnership so long as the common ancestor is alive."

In the case of *Lachmandas* v. *Khunnu Lal and others* (1) a Full Bench of the Allahabad High Court have held that on a mortgage by a Hindu, subject to the Mitakshara, of a joint ancestral property the sons and grandsons of the mortgagor were equally liable for the interest secured by the mortgage in addition to the principal amount. The learned Judges in that case considered that, although the law of the Mitakshara made a certain distinction in the liability of the son and grandson with regard to ancestral debts, such distinction was not recognised by the British Indian Courts out of the Bombay Presidency. The question of the great-grandson's liability did not form the subject of discussion in that case; the enunciation was, therefore, confined to the obligation of a grandson.

The High Court of Allahabad, in the present case, seems to have thought that the Hindu law did not extend the liability for the payment of ancestral debts beyond the grandson. That conclusion seems to be wrong. The law of the Mitakshara

1. (1896) I L R 19 All 26: 16 A W N 185 (F B).

proceeds on a logical basis; rights are created by birth up to the third generation, viz., son, grandson and great-grandson, the son of a grandson is entitled equally with his father to question the validity of debts contracted by the ancestor after his birth. His obligation to discharge the valid debts of that ancestor is therefore co-extensive with the rights. This view is supported not only by the principle on which the liability of the descendants is based but by express rules. Mitra Misra (the author of the *Viramitrodaya*) states the rule thus: —"The term 'sonless' used in the text (on succession)—such as 'The wife and the daughters also, etc.'—indicated the default of the grandson and the great-grandson also. The succession of the wife is proper only in default of male issue down to the great-grandson. For the duty of the grandsons, too, to pay off the debts is declared in the text, 'The debts ought to be liquidated by the sons and grandsons (*puttra pauttratis*); but if any one else were to take the estate in spite of the grandson, then the declaration of the grandson's liability to discharge the debts would be unreasonable, since by reason of the text—'The heir to the estate of a person shall be compelled to liquidate his debts,'—he alone who takes the estate is declared liable to discharge the debts. If it be argued that the grandson is included under the term 'gentiles' and as such may take the estate, then in that case there would be no use for the special provision regarding the grandson's liability to discharge the debts; since it would follow from the text alone, viz.: 'The heir to the estate of a person shall be compelled to liquidate his debts.' If it be said that the grandsons are liable in the same way as sons to liquidate the debts, although they do not get the grandfather's estate, then *a fortiori* it follows that when property is left by the grandfather, the right of any others than the grandson ought not to take place. The same reason applies to the great-grandson also."

Then after discussing the meaning of the words *puttra-pauttratis*, he proceeds thus:—"Accordingly the different sorts of provisions for the liquidation of the debts by the great-grandsons as distinguished from the same by the grandsons, and by the grandsons as distinguished from the same by the sons, become consistent with reason. Otherwise there would arise the objection of assuming a peculiar provision so far as regards the great-grandsons."

Again Vijnaneswara, commenting on the following enunciation of Yajnavalkya [II, 50 (a)]: "The father being gone

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to a foreign country or deceased (naturally or civilly) or afflicted with an incurable disease, the sons or their sons must pay his debt, but, if disputed, it must be proved by witnesses,' states that "Brihaspati says: 'The sons must pay the debts of their father when proved as if it were their own (*i. e.*, with interest); the grandson has to pay only the principal while the great-grandson shall not be compelled to pay anything unless he have assets.' "*

The Hindu lawyers appear to have made a difference in the obligations resting upon sons, grandsons and great-grandsons. The son was bound to discharge the ancestral debt as his own, principal and interest, whether he received any assets or not from the ancestor. The grandsons had to discharge the debt without interest and the great-grandson's liability arose only if he received any assets from the ancestor.

The British Indian Courts have held that the son and grandson are not liable for any debt unless they receive assets and that the obligations of each of them, sons and grandsons, are co-extensive. In the case of *Brij Narain* v. *Mangla Prasad and others* (2) the son's liability is expressly laid down, and their Lordships think that that rule extends equally to grandsons and great-grandsons.

In the present case it is amply proved that in 1901 Jawahir Lal borrowed on a mortgage Rs. 11,000 from one Abid Ali Khan and that in 1903 he similarly borrowed over Rs. 3,000 from certain people of the name of Sri Ram and Ganeshi Lal. Jawahir Lal appears to have died after 1903, and Janki Prasad, his grandson, became manager of the ancestral estate. In 1906 he sold the property now in suit to the defendants for Rs. 18,400. It is established to the satisfaction of both the Courts in India that out of the consideration for the sale, Rs. 3,000 odd went to the discharge of the debts due to Sri Ram and Ganeshi Lal. The Subordinate Judge has found on the evidence that a large portion of the said consideration amounting to Rs. 12,700 was applied by Janki Prasad to the discharge of the debt due to Abid Ali Khan. A certain balance was left outstanding and the mortgagee brought a suit against Janki Prasad and Damodar Prasad, the plaintiff, for the balance. The plaint in that suit is Ex. E. It states that "Rs. 3,072-13-0, principal and Rs. 935-3-0, interest, in all, Rs. 4,008, was still due to the plaintiffs from the defendants; and the property mortgaged,

*West and Buhler's Hindu Law (Third Edition), Vol. II, pp. 1241-1242.

2. (1923) L R 51 I A 129: 46 A 95: 46 M L J 23 (P C).

after deducting Rs. 12,700 which the plaintiff had received." It goes on to state further that

"About six years ago, Lala Jawahir Lal, the principal mortgagor, died. Defendant No. 1 is his grandson, and defendant No. 2 his great-grandson; and the family of all the above-mentioned three men was a joint Hindu family, and debt was contracted for family necessity. Now the defendants are in possession of the hypothecated property and liable for payment of the debt."

On this claim a decree was made against Janki Prasad and Damodar Prasad for the sum of Rs. 4,614, and, on the 14th July, 1914, Janki Prasad put in an application depositing that amount.

Counsel for the appellants was quite justified in laying stress on this application as showing that Janki Prasad and Damodar Prasad never questioned in that suit the legality of the mortgage to Abid Ali Khan and accepted the full benefit of the discharge of Abid Ali Khan's mortgage.

Their Lordships are of opinion that the view taken by the High Court regarding the obligation of the great-grandson to pay the debt of the ancestor is not well-founded in law. In this case the recognised obligation resting on the grandson was accepted by Janki Prasad. He had discharged the debt which he was bound to do and, in their Lordships' opinion, his son could not turn round to say that it had been been invalidly discharged. Their Lordships are of opinion that it has been amply proved in this case that the sum of Rs. 12,700 was applied to the payment of Abid Ali Khan's mortgage.

The only sum that was left unaccounted for was Rs. 2,000 odd, as found by the Subordinate Judge. Janki Prasad, the plaintiff's father, admittedly received the whole consideration, and he was the man who used the largest part of the money for the discharge of the ancestral debts. He could have told in his evidence how the sum of Rs. 2,000 was applied. There is no evidence that it was used for immoral or unauthorised purposes. His testimony was therefore most material in the case. Efforts were made to get him into the witness-box, but he studiously avoided appearing in Court. The Subordinate Judge says father and son were living together at the time, and he surmised that he was in collusion with his son. In this view the learned Judges of the High Court appear to agree. Their Lordships have no doubt on the facts that the present action is a collusive one, that the testimony of Janki Prasad as to the application of the balance of Rs. 2,000 was deliberately withheld, and that the transfer in 1907 by the father to the son was equally collusive.

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In their Lordships' judgment, the ruling in *Vadivelam Pillai* v. *Natesam Pillai* (3) does not apply to the facts of this case.

On the whole case, their Lordships are of opinion that the judgment and decree of the High Court should be set aside and the plaintiff's suit dismissed with costs in all the Courts, and they will humbly advise His Majesty accordingly. The respondent will pay the costs of this appeal.

Solicitor for appellants : *H. S. L. Polak.*

A. de M. *Decree set aside.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE JACKSON.

Kunju *alias* Vaithianathaswami Aiyar. . .*Petitioner** (*Accused*)

Vaithianathaswami Aiyar *In re.*

Penal Code, Ss. 417, 511 *and* 193, 511—*Debt—Registered and insured packet purporting to contain currency notes in settlement of, but actually containing only waste paper—Despatch of, by debtor—Suit by creditor in Civil Court for debt—Debtor's petition in Civil Court to admit creditor's postal acknowledgment of insured packet as evidence in proof of satisfaction—Offence committed in such case.*

Petitioner owed money to the complainant and sent a registered and insured packet purporting to contain currency notes in settlement of the debt. The packet contained waste paper. Complainant sued petitioner for the debt, and petitioner filed an application in the Court of the Subordinate Judge to receive the complainant's signed acknowledgment of the receipt of the packet as collateral evidence in proof of satisfaction. The petitioner was convicted of offences under Ss. 417, 511 and 193, 511 of the Indian Penal Code.

Held, in revision, that the only offence committed by the petitioner on the facts found was an offence punishable under S. 193, Indian Penal Code and that the Sub-divisional Magistrate could not take cognizance of that offence, without sanction from the Subordinate Judge.

Petition under Ss. 435 and 439 of the Code of Criminal Procedure, 1898, praying the High Court to revise the judgment of the Court of Session, East Tanjore Division at Negapatam in Criminal Appeal No. 3 of 1926, preferred against the judgment of the Court of the Sub-divisional First Class Magistrate of Mayavaram in C.C.No. 47 of 1925.

K. S. Jayarama Aiyar for petitioner.

The Public Prosecutor on behalf of the Crown.

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*Cr R C No. 276 of 1926
(Cr. R P No. 246 of 1926). 6th September, 1926.

3. (1912) I L R 37 M 435: 23 M L J 256.

Vaithianathaswami Aiyar, *In re.*

The Court made the following

ORDER:—The petitioner has been sentenced to twelve months' rigorous imprisonment under Ss. 417, 511 and 193, 511, Indian Penal Code.

Petitioner owed money to the complainant and sent a registered and insured packet purporting to contain currency notes in settlement of the debt. The packet contained waste paper. Complainant sued petitioner for the debt, and petitioner filed an application in the Court of the Subordinate Judge to receive the complainant's signed acknowledgment of the receipt of the packet as collateral evidence in proof of satisfaction.

The petitioner was charged on 25th May, 1925 with attempting to cheat the complainant by inducing him to sign the acknowledgment for the receipt, the offence under Ss. 417, 511 and on 22nd Aug., 1925 he was further charged that he caused circumstances to exist as detailed in the charge under Ss. 417. 511 and made a document containing a false statement intending that such circumstance and false entry may appear in a judicial proceeding and that they may cause an erroneous opinion to be formed touching the offence of cheating, the offence under Ss. 193, 511, Indian Penal Code.

The Sub-divisional Magistrate should paragraph his judgments. The first three paragraphs set forth the facts. Paragraph 4 describes how the bench clerk of the Mayavaram Subordinate Court proved that in that Court the accused attempted to file the acknowledgment in the course of the civil suit between him and complainant. In paragraph 5 the law is discussed. The Sub-divisional Magistrate defers to the clear rulings in *Raman Behari Roy* v. *Emperor* (1) and *Tula Ram* v. *Emperor* (2), that the facts of the case do not constitute cheating, but he holds, following the Patna ruling in *Sadho Lal* v. *Emperor* (3) that there is an attempt to cheat, though acknowledging that that ruling is dissented from in *Tula Ram* v. *Emperor* (2). The Magistrate distinguishes that latter case because there it is stated that if the accused was put to the proof of discharge he might imagine that the acknowledgment of the packet would be some sort of a proof; whereas in the present case he actually did attempt to use the acknowledgment for this purpose.

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1 (1923) I L R 50 C 849. 2. (1923) 21 A L J 865. 3. (1916) 34 I C 992.

Vaithianathaswami Aiyar, *In re.*

But Sulaiman, J., does not hold that if the acknowledgment was used in a judicial proceeding there would be an attempt to cheat. He holds that in those circumstances the offence of fabricating false evidence might be committed. In the Patna case no reasons are given for holding that the facts constitute an attempt, and it is difficult to understand how the learned Judges could have held (if their attention was particularly directed to this point which is unlikely for they were only considering a petition under S. 439) that the facts amounted to anything more than preparation. There cannot be an attempt unless the actual transaction has commenced (*In the matter of the petition of Riasat Ali* (4)]. The actual transaction in these cases would be the fraudulent defence of the suit for recovery of the debt; and until then in the picturesque phrase of the Magistrate the accused 'armed with the postal receipt was only waiting for his time to bolster it up in a judicial proceeding as a trap door to escape.' In short, he was prepared with a defence, but had not yet attempted to cheat.

The Appellate Court takes this point in its 12th para, and finds in its 13th that the offence of cheating, not an attempt to cheat, is committed by the representation of the accused that the cover contains currency notes worth Rs. 500 which had induced the addressee to acknowledge the receipt of that insured cover, which is likely to cause harm to the complainant. This is counter to the ruling in *Raman Behari Roy* v. *Emperor* (1) and *Sadho Lal* v. *Emperor* (3) for the Patna Bench agrees that the facts do not amount to a complete offence of cheating. *Arura* v. *Emperor* (5) (which is not a High Court ruling and need not have been cited) is to the same effect. And at the close of para. 13 the learned Judge himself refers to Ss. 417, 511, although his finding is that the actual offence of cheating was committed. The Judge would have been better advised to follow *Raman Behari Roy* v. *Emperor* (1), for the point is quite plain. The act of signing a postal acknowledgment by itself is not likely to cause damage To satisfy the definition of cheating there must be immediate causation, and the act itself must involve the probability. It is not enough to say that the signed acknowledgment is likely to be used so as to cause damage; the act of signing itself must be likely to cause damage. Nor can there be said to have been an attempt as distinguished from a preparation, as already shown in discussing the trial Court's judgment.

1. (1923) I L R 50 C 849.
3. (1916) 34 I C 992.
4. (1881) I L R 7 C 352 at 356.
5. (1912) 20 I C 596

Vaithianathaswami Aiyar, *In re.*

There remains the second charge under Ss. 193, 511, Indian Penal Code.

The Sub-divisional Magistrate finds in paragraph 6 that the accused created a false document and actually used it in a judicial proceeding. He filed the postal receipt in the suit filed against him in the Subordinate Court supported by an affidavit that he had discharged the debt. The charge, however, is that accused made a false document intending that it might cause an erroneous opinion to be formed touching the offence of cheating. Apparently the Court that the Sub-divisional Officer had in view was the Criminal Court, which argues a confusion of mind only explicable by the fact that he could not take cognizance of the proceeding in the Civil Court without sanction. Yet the finding is that accused used a false document in the Civil Court, the completed offence under Ss. 196, 193, on which S. 511 has no bearing. The Appellate Court finds as a matter of fact that the accused petitioned the Sub-Court for admitting the receipt, and he therefore attempted to fabricate false evidence though he did not succeed in it, the offence under Ss. 193, 511. This is hardly correct. He may not have succeeded in getting the evidence accepted; but he attempted to use as true fabricated evidence, the offence under S. 196. (The postal acknowledgment was a circumstance caused to exist with the intention of causing an erroneous opinion.)

On these findings of fact it is clear that an offence punishable under S. 193 was committed of which the Sub-divisional Magistrate could not take cognizance, except on the complaint of the Subordinate Judge. The fact that the Sub-divisional Magistrate took cognizance of an offence on a police charge-sheet under S. 420 on March 5, and the accused attempted to use the fabricated evidence on March 31st does not absolve the Sub-divisional Magistrate from obtaining sanction when he decided on August 22 to frame a charge under Ss. 193, 511. When the facts were brought to the Magistrate's knowledge it was alleged that the offence was committed in relation to a proceeding in the Sub-Court, and S. 195 (*b*), Criminal Procedure Code, makes sanction imperative.

The petitioner never raised this question in the Appellate Court, but he can hardly be blamed because he is only charged and convicted for fabricating false evidence to mislead the Court in regard to the offence of cheating, and the second charge is really ancillary to the first to bring it into conformity

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with *Tula Ram* v. *King-Emperor* (2). But the offence for which he is really convicted, and could only be convicted, is that in relation to the Subordinate Court proceedings.

No doubt in vacating the proceedings on the comparatively trivial charge under S. 511, and preferring to stand his trial for a completed offence under S. 193 the petitioner runs grave risk of enhanced punishment; but that is his own concern.

I find that no offence under Ss. 417, 511, Indian Penal Code, has been committed; and if the petitioner is to be re-tried under S. 193, Indian Penal Code, sanction should be applied for in the Court of the Subordinate Judge, Mayavaram. The findings and sentence of the Sessions Judge and Sub-divisional Magistrate are reversed and petitioner is released from his bail. His retrial must abide the decision of the sanctioning Court.

A. S. V. *Sentence reversed and Petitioner released from bail.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE ODGERS AND MR. JUSTICE CURGENVEN.

Mahaboob Sir Prajuvanthu Sree Rajah Parthasaradhi Appa Rao Savaji Aswa Rao Bahadur Zamindar Garu ... *Appellant** (*Appellant in S. A. No.* 96 *of* 1923 *on the file of the High Court—Plaintiff*)

v.

Turlapati Subba Rao and others .. *Respondents* (*Respondents in do. Defendants* 1 *and* 3 *to* 5).

Sree Rajah Parthasaradhi Appa Rao *v.* Subba Rao.

Legal Practitioner—Engagement by Zamindar to conduct estate litigations—Relationship between practitioner and Zamindar—General agency or separate agency in respect of each litigation—Amount due from pleader on accounts—Zamindar's suit against pleader for—Suit after his death against his legal representatives—Limitation—Limitation Act, Art. 89.

An order by a Zamindar appointing a pleader to conduct his estate litigations does not amount to a general power of attorney and does not have the effect of making the pleader the general agent of the Zamindar from the date when he was first engaged to the date of his death. The agency created in such a case is a separate agency beginning and terminating with each suit or other proceeding in which the pleader is engaged.

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*L P Appeal No. 124 of 1924. 24th September, 1926.

2. (1923) 21 A L J 865.

Sree Rajah Partharaadh Appa Rao v. Subba Rao.

Held, accordingly, that, in a suit brought by the Zamindar against the pleader for the recovery of a sum alleged to be due from the pleader to the Zamindar on account of moneys received and not accounted for by the pleader, each proceeding had or taken under a separate vakalat would have furnished the basis for an account to be rendered, and time would have run from the date of termination of the proceeding.

Held further, that the rule of limitation would not be different, if the suit was brought, after the death of the pleader, against his legal representatives, because the cause of action against the legal representatives would not be different from that which was available against the deceased.

Appeal under cl. 15 of the Letters Patent against the judgment of the Hon'ble Mr. Justice Phillips, dated 2nd April, 1924 in S. A. No. 96 of 1923, preferred against the decree of the Court of the Subordinate Judge of Kistna at Ellore in A. S. No. 65 of 1922 preferred against the decree of the Court of the Additional District Munsif of Ellore in O. S. No. 204 of 1921.

P. Chenchiah for *P. Venkataramana Rao* for appellant.

S. Varadachariar and *V. Suryanarayana* for respondents.

The Court delivered the following

JUDGMENTS :—*Odgers, J.* :—In this case the plaintiff, a Zamindar, sued the legal representatives of a pleader who was employed to conduct certain summary suits, etc., in Bhimavaram for the plaintiff asking for a decree for about Rs. 1,800 being the amount due from the deceased pleader to the Zamindar on account of moneys received and not accounted for by him. Now the Subordinate Judge after calling for findings as to what suits the pleader had appeared in and when those were disposed of, held that only 22 suits were disposed of before the institution of this suit, and the most important point perhaps urged by Mr. Chenchiah for the appellant in L. P. Appeal from the judgment of my brother Phillips (who dismissed the second appeal) is the point of limitation. Mr. Chenchiah urges the following points: Firstly, that there was a general agency, that is to say, that the pleader was what is sometimes called a "standing vakil" to the Zamindar and therefore his agency must be taken to have extended from 1916 when he was first engaged, to his death in March, 1918. Now this contention was not only negatived by my brother Phillips but by the Subordinate Judge also, chiefly on the authority of the case reported in *Saffron Walden Second Benefit Building Society* v. *Rayner* (1) where the Lords Justices held that there was no such thing as an office of a solicitor and Lord Justice

Odgers, J.

1. (1880) 14 Ch D 406.

Sree Rajah Parthasaradhi Appa Rao v. Subba Rao.

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James points out that a solicitor is a man's solicitor "when he chooses to employ him and in the matter in which he is so employed" Lord Justice Bramwell says that "a man is a solicitor for another when that other has occasion to employ him as such." It is of course not disputed that in our practice the pleader has to file a separate vakalat for every suit that he institutes on behalf of his client. And that was so in the present course of employment; a separate vakalat being also filed by the pleader in each execution proceedings (Ex. R.) so that in my opinion this contention must be negatived.

Then it was contended that even if his agency was not general, his accounts were, that is to say, that the pleader maintained an open current account with the client and that the account instead of being closed as each suit was disposed of, simply ran on in the ordinary way, familiar to us, as payments by the employer and drawings against those payments by the pleader. Now that really is a pure matter of surmise because the only accounts that we have in evidence are contained in Ex. R which in my opinion negatives any such idea. There, the suits are kept separate, the expenses for each execution petition are set out and there is no ground for saying on such accounts as we have, that there was anything in the nature of an open running account between the client and his pleader.

Now, then with regard to limitation, Mr. Chenchiah strongly contended before us that there was a liability to account outstanding at the death of the pleader when the agency terminated and that therefore every item of account within three years from the date of the death of the pleader must be taken into account in this suit He argued that a new cause of action arises as against the legal representatives and that therefore he is entitled to reckon three years, not from the date of the suit but from the date of the termination of the agency. Now in support of this proposition we have been referred to *Kumeda Charan Bala* v. *Asutosh Chattopadhyaya* (2), *Kali Krishna Pal* v. *Srimati Jagattara* (3) and *Bindraban Behari* v. *Jamuna Kunwar* (4). It is noteworthy that no Madras case has been cited, although one is to be found in *Natesayyan* v. *Ponnuswami* (5) to this effect. In fact our law as laid down in Madras is in favour of the opposite view. *Natesayyan* v. *Ponnuswami* (5) has been overruled in *Malle-*

2. (1912) 17 C W N 5
3. (1868) 2 Beng. L R 139 (F B).
4. (1902) I L R 25 A 55
5. (1892) I L R 16 M 99: 3 M L J 1.

Sree Rajah Parthasaradhi Appa Rao v. Subba Rao.

Odgers, J.

sam Naidu v. *Jugala Panda* (6), the view which is also supported by *Periaswami Mudaliar* v. *Seetharama Chettiar* (7) and there is direct authority in *Arunachalam Chetty* v. *Raman Chetty* (8). Mr. Chenchiah tried to distinguish this case on the ground that there the suit was barred when instituted, being more than three years after the death of the agent and therefore could not apply to the principle for which he was contending. But the judgments clearly show that the agent died in April, 1919, and the suit was brought in December of the same year. The learned Judge held that there was no separate cause of action as against the sons, that is to say, the action against the sons is not different from that against the father and as it was barred against the father, after his life it was also barred against the sons. Mr. Justice Spencer in his judgment in that case distinctly says that *Natesayyan* v. *Ponnuswami* (5) has been overruled by the two later Madras cases referred to above and that the matter falls under Art. 89 of the Limitation Act. It was faintly suggested on the authority of the case in *Kumeda Charan Bala* v. *Asutosh Chattopadhyaya* (2) that as legal representatives are not mentioned in Art. 89, that article can have no application to a suit like the present. That in my view is distinctly overruled by the case in *Arunachalam Chetty* v. *Raman Chetty* (8) and it is pointed out by Mr. Varadachariar that there are many articles which would be reduced to absurdity if this contention were applied to them, for instance, Arts. 78 and 79. The column under which these articles appear is headed "Description of Suit". To my mind the omission of any mention of legal representatives in the word under "Description of Suit" does not mean that the article is not intended to apply to a suit against the legal representatives in order to let in Art. 120. It seems to me that in this case we ought to follow the decisions in *Arunachalam Chetty* v. *Raman Chetty* (8), *Mallesam Naidu* v. *Jugala Panda* (6) and *Periaswami Mudaliar* v. *Seetharama Chettiar* (7) and no reason has been shown why any of these decisions should be held to be inapplicable to the present case. It seems to me therefore that the appeal fails on all the points put forward and must be dismissed with costs.

Curgenven, J.

Curgenven, J. :—The only issue we have to decide in this Letters Patent Appeal is that of limitation. The appeal is

2. (1912) 17 C W N 5 5. (1892) I L R 16 M 99 : 3 M L J 1
6 (1899) I L R 23 M 292 (F B)
7. (1903) I L R 27 M 243 : 14 M L J 84 (F B). 8. (1914) 16 M L T 614.

Sree Rajah Parthasaradhi Appa Rao v. Subba Rao.
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Curgenven, J.

taken against the judgment of Phillips, J. in second appeal affirming the appellate judgment that such claims as would be barred against the pleader himself are barred against his sons and legal representatives, the defendants.

I think there can be no doubt that a separate agency began and terminated with each suit or other proceedings. It is true that there is an order of appointment (Ex. B-2) under which the pleader was to conduct the estate litigation, but it did not amount to a general power of attorney, and it has not even been suggested that it would of itself have given the pleader authority to conduct the suits. That was furnished by the vakalat executed in each case, and it was the vakalat therefore that created the agency. It is then said that, granting so much, the agency did not come to an end with the suit, but continued until the pleader had accounted to his principal or had refused to account. Even assuming this to be so, it is acknowledged in the plaint that in some instances accounts had been rendered, and since there is no evidence on the record to show which cases these were, it is not possible to say, in any particular case, that account was not rendered. It must be taken, I think, that the agency in a given case came to an end with the case, and this assumption is the more permissible since we find that separate vakalats were executed for suits and for execution proceedings.

Thus, had the suit been against the pleader himself, each proceeding had taken under a separate vakalat would have furnished the basis for an account to be rendered, and time would have run from the date of termination of the proceeding. Would the rule of limitation be different, now that the father is dead and the suit is against the sons ?

The answer to the question depends upon whether the sons were sued upon a cause of action different from that which was available against the father. In other words, did a fresh cause of action arise upon the father's death ? The question, I think, is to be answered in the negative both upon general principles and upon authority. Suppose the father has been sued and had died pending suit. There is no doubt, whatever, I suppose, that the sons could have been substituted for him as his legal representatives, and the suit continued. This must surely mean that the cause of action survived the father's death, and was available also against the sons. A legal representative, so far as the assets come into his hands, carries on the liability of the deceased in all cases where that liability does not lapse with the death. Of the cases cited which appear to

Sree Rajah Parthasaradhi Appa Rao v. Subba Rao. — Curgenven, J.

run counter to this doctrine, the only one in which the facts raise an issue strictly analogous to the present is *Bindraban Behari* v. *Jamuna Kunwar* (4). In that case it was not only held that a fresh cause of action arose, when, upon the death of the father, the money came into the defendant's hands but, further, that the suit against the son would not fall under Art. 89 of the Limitation Act, because the suit was not against the agent but against his legal representative. With all respect, I must dissent from both propositions—against the latter it has only to be pointed out that Limitation Act classifies suits according to their "description" and that a suit of the description referred to in Art. 89 may be brought against the legal representative of an agent as well as against the agent himself, just as under Art. 78 the drawer's representatives may be sued upon a dishonoured bill of exchange. Against the doctrine that receipt of the money by the son creates a fresh cause of action, the Madras case relied upon by the learned Judge, *Arunachalam Chetty* v. *Raman Chetty* (8), appears to me to be clear authority from which I can see no reason to differ.

It may be, as was admitted in *Venkatacharyulu* v. *Mohana Panda* (9), that the onus and methods of proof may differ when the suit is against a legal representative, and it may even be that the remedy would be different in kind; but those are no reasons for holding that a fresh cause of action arose when the assets liable for the claim came into the defendant's hands upon their father's death.

I agree therefore that this appeal must be dismissed with costs.

A. S. V. *Appeal dismissed.*

PRIVY COUNCIL.

(On appeal from the High Court of Judicature at Bombay.)

PRESENT :—THE LORD CHANCELLOR, LORD JUSTICE WARRINGTON AND CHIEF JUSTICE ANGLIN.

Sobhagmal Gianmal ... *Appellant**

v.

Mukundchand Balia ... *Respondent.*

P. C. — Sobhagmal Gianmal v. Mukundchand Balia.

*Contract Act (IX of 1872), S. 30—Contract—Sale of goods—Options—Forward contracts—*Cutcha adatia *and* Teji Mandi *commercial customs in Bombay.*

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*P C Appeal No. 1 of 1926. 26th July, 1926.

4. (1902) I L R 25 A 55 at 56.

8. (1914) 16 M L T 614.

9. (1920) I L R 44 M 214: 39 M L J 586.

P. C.

Sobhagmal Gianmal v. Mukundchand Balia.

—*Alleged wagering transactions—Bombay Wagers Act (III of 1865)—Principal's liability to indemnify agent.*

The respondent acted as the appellant's *cutcha adatia* agent in Bombay, making on his behalf with third parties (*a*) forward contracts for the sale and purchase of Broach and Bombay cotton, and (*b*) dealings in options on Broach cotton on *Teji Mandi* lines. Some of these transactions were entered into with the third parties directly by the appellant himself or his *munim*, who then gave the name of the respondent as his agent, so that the third parties looked to the respondent as the appellant's *cutcha adatia*. Though there was an arrangement between the appellant and the respondent that he was not really to take or give delivery in respect of the transactions, but only to pay or receive differences, there was no evidence of any such arrangement with the third parties interested. The various transactions entered into resulted in losses amounting to Rs. 1,83,632-5-6, which were paid by the respondent, and which he claimed to be re-imbursed or indemnified for by his principal, the appellant. The latter pleaded an arrangement as aforesaid between him and the respondent whereby he was only to pay or receive differences, and not to give or take delivery, and, further, that the *Teji Mandi* bargains were meant only to cover him against loss on his forward contracts; that, accordingly, all the contracts, being in the nature of wagering contracts, were unenforceable by reason of the Indian Contract Act (IX of 1872), S. 30, and the Wagers Act of Bombay (III of 1865).

Held, affirming the judgment of the High Court in its Appellate Jurisdiction, that both the appellant and the respondent being bound to the third parties either to perform their obligations under the several contracts (which were genuine) or to pay damages, and the appellant, who was solely entitled to the benefit of such contracts, being bound *prima facie* to indemnify his agent, the respondent, against any liability incurred in respect of them, and, on the other hand, the only remuneration therefrom to the respondents was his commission as agent, and not any loss or gain on the contracts, and no arrangement was made with the third parties that delivery was not to be given or taken, but only differences paid, there was no element of wagering in the transactions.

Manilal Dharamsi v. *Allibhai Chagla*, (1922) I L R 47 B 263 and *Forget* v. *Ostigny*, (1895) A C 318 referred to.

Appeal from a decree of the High Court in Appeal (Shah, Ag. C. J. and Kincaid, J.), dated the 10th September, 1924, which reversed a decree of the same Court in its Original Civil Jurisdiction (Kemp, J.), dated the 9th April, 1924, dismissing the respondent's suit.

The respondent, carrying on business as shroff and commission agent in Bombay, acted as *cutcha adatia* there for the appellant, the mode of dealing of such *cutcha adatia* agent being that described by Chandavarkar, J. in *Fakirchand Lalchand* v. *Doolub* (1). As such *cutcha adatia* the respondent, in consideration of the payment of his commission, executed the various orders that the appellant from time to time gave him for negotiating forward contracts with the public for the sale and purchase of Broach and Bombay cotton, and also

1. (1905) 7 Bom. L R 213 at 215-6.

P. C.

Sobhagmal Gianmal v. Mukundchand Balia.

for negotiating *Teji Mandi* dealings in options on Broach cotton. A number of transactions with third parties were also entered into directly by the appellant himself or his *munim*, who then gave the respondent's name as his agent, the third parties with whom the contract was made thereupon having the liability of the respondent as the appellant's *cutcha adatia*. There was an arrangement between the appellant and the respondent that the appellant was not either to take or give delivery in respect of the forward contracts, and that the *Teji Mandi* transactions were meant to cover him against any possible losses on the forward contracts; but no such arrangement was made with any of the third parties with whom the various transactions were entered into. On the whole, the result of all the transactions taken as a whole was a loss of Rs. 1,83,632-5-6 which the respondent paid as and when called upon, and for the re-imbursement of which, as indemnity due by a principal to his agent, he brought an action against the appellant. The appellant pleaded that all the contracts were in the nature of wagering transactions, and therefore unenforceable under the Indian Contract Act (IX of 1872), S. 30, and the Bombay Wagers Act (III of 1865). This contention was accepted by the Trial Judge (Kemp, J.) and the claim dismissed, but his judgment was reversed upon appeal by Shah, Acting C. J. and Kincaid, J. and an enquiry was directed as to how much was due by the appellant to the respondent. The appellant thereupon appealed to His Majesty in Council.

Geoffrey Lawrence, K. C. and *E. B. Raikes* for appellant. —There are concurrent findings of both the Lower Courts that there was an arrangement or understanding between the respondent and the appellant that the latter should not be required to give or take delivery, and this necessarily involves the inference that the transactions were wagers; in fact, the appellant was in no case called upon to take delivery in any of the transactions. The *Teji Mandi* transactions were really a bet on the rise or fall of the market above or below a certain figure, that figure being the rate at which the individual transactions were effected *plus* the *nazrana*, and though a previous decision of the High Court [*Manilal Dharamsi* v. *Allibhai Chagla* (2)] has ruled that a *Teji Mandi* transaction is not as a matter of course a wager, the Trial Judge was right in holding that they were wagers in this case. If, and so far as, the respondent made agreements with third parties without

2. (1922) I L R 47 B 263.

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Sobhagmal Gianmal v. Mukundchand Balia.

stipulating that his principal should not be called upon to give or take delivery, he exceeded his authority, and such agreements were accordingly not binding upon the appellant.

A. C. Clauson, K. C., Sir G. Lowndes, K.C. and *R. K. Chappell* for respondent.—The respondent, in acting as the appellant's *cutcha adatia*, was authorised to make himself personally liable on contracts with third parties, and also to make the appellant personally liable to the third parties; and he did in fact so render himself personally liable, as well as the appellant, to the third parties. The appellant is therefore bound to indemnify the respondent for such losses as he has suffered through acting on his behalf. There was no common intention as between the parties to the contracts (viz., the appellant and third parties, or the respondent and third parties) that the appellant or respondent was only to pay or receive differences. Finally, even, if the contracts between the appellant and the respondent were *prima facie* gaming and wagering, the respondent is entitled to recover on them, inasmuch as he rendered himself personally liable to third parties in executing the orders of the appellant.

[In the course of the argument, the following authorities were also referred to:—*Manilal Raghunath* v. *Radhakisson Ramjiwan* (3), *Perosha Cursetji* v. *Maneckji Dossabhoy* (4), *Sassoon* v. *Tokersey Jadhawji* (5), *Bhagwandas* v. *Kanji* (6), *Bhagwandas Parasram* v. *Burjorji Ruttonji* (7) and *Forget* v. *Ostigny* (8).]

26th July, 1926. The Judgment of the Board was delivered by

Warrington, L. J.

LORD JUSTICE WARRINGTON :—The question in this appeal is whether the contract between the appellant and the respondent sought to be enforced in the suit was a wagering contract, and therefore, under the provisions of S. 30 of the Indian Contract Act, void and incapable of being enforced.

The respondent (the plaintiff in the suit) carries on business in Bombay as a merchant and agent on commission.

The appellant (the defendant in the suit) is a merchant and at all material times resided in the Native State of Bhopal.

During the years 1914 and 1917 the respondent acted in the transactions in question as commission agent for the appel-

3. (1920) I L R 45 B 386.
4. (1898) I L R 22 B 899.
5. (1904) I L R 28 B 616.
6. (1905) I L R 30 B 205.
7. (1917) L R 45 I A 29 · 34 M L J 305 (P C).
8. (1895) A C 318.

lant on what are known in Bombay on *cutcha adatia* terms, the appellant being his up-country constituent.

There is no dispute that as regards *cutcha adatia* transactions the course of business and the relative positions of the parties are as follows:—When a *cutcha adatia* enters into transactions under instructions from and on behalf of his up-country constituent with a third party in Bombay, he makes privity of contract between the third party and the constituent, so that each becomes liable to the other, but also he renders himself responsible on the contract to the third party. He does not ordinarily communicate the name of his constituent to the third party, but he informs the constituent of the name of the third party. The position, therefore, as between himself and the third party is that he is agent for an unnamed principal with personal liability on himself. His remuneration consists solely of commission, and he is in no way interested in the profits or losses made by his constituent on the contracts entered into by him on his constituent's behalf.

In pursuance of the course of business so described, the respondent, acting as *cutcha adatia* for the appellant, made forward contracts on his behalf for purchase and sale of Broach and Bombay cotton, and he also had dealings on his behalf in options on Broach cotton, known as *Teji Mandi* transactions. These various transactions resulted from time to time in losses which were paid by the respondent. The action is for the balance due to him on his agency account, including his commission.

The contracts for sale and purchase of cotton were, so far as the third parties were concerned, genuine contracts, and not mere gambling transactions. As to the *Teji Mandi* transactions, there was no evidence to distinguish them in this respect from the forward contracts and the Appeal Court has dealt with them on the same footing. Their Lordships think they were right in so doing. There is no presumption that such transactions are wagers [see *Manilal Dharamsi* v. *Allibhai Chagla* (2)], and in the absence of evidence to the contrary, they should be treated as genuine contracts.

The only circumstance on which reliance is placed in support of the contention that as between the appellant and the respondent their contract was a wagering contract, is that there

2. (1922) I L R 47 B 263.

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was between them an understanding that the respondent would not call upon the appellant either to give or take delivery.

In the Court of First Instance, Kemp, J. pronounced judgment in favour of the appellant and dismissed the suit.

This judgment was reversed on appeal by Shah, Acting Chief Justice, and Kincaid, J., who directed an account of what was due from the appellant to the respondent.

The appellant obtained the leave of the High Court at Bombay to appeal to His Majesty in Council and the present appeal was presented accordingly.

In the opinion of this Board the decision of the Appeal Court is correct.

The respondent, as the appellant's agent, and acting in accordance with his mandate, made genuine contracts on his behalf with third parties in Bombay. Under these contracts both the appellant and the respondent were bound to the third parties either to perform their obligations or to pay damages for their breach. The respondent having entered into these contracts as agent for the appellant, the latter was *prima facie* bound to indemnify the former against any liability incurred in respect of them. He was, on the other hand, exclusively entitled to the benefit of them—a gain to the appellant would involve no loss to the respondent, nor would a loss to the appellant result in a gain to the respondent. The only remuneration to the respondent was his commission [see *Forget* v. *Ostigny* (8)]. The understanding between them referred to above merely means that the respondent would, by covering contracts or otherwise, provide for or take the goods or pay the difference on the appellant's behalf. In all this there is not, in their Lordships' opinion, any element of wagering as between the two parties. As between them neither party stands to win from or lose to the other according to fluctuation of price or any other event. The very essence of a wager between them is thus absent.

Counsel for the appellant raised before this Board a new point founded on Ss. 1 and 2 of the Bombay Act III of 1865. But once it is established that the contracts with the third parties are genuine contracts and not wagering transactions, the provisions of these sections have no application and the point therefore fails.

For these reasons and for those more elaborately stated by the Appeal Judges, this Board is of opinion that the appeal

8. (1895) A C 318 at 322.

ought to be dismissed with costs, and will humbly advise His Majesty accordingly.

Solicitors for appellant : *Lattey and Hart.*
Solicitors for respondent : *T. L. Wilson and Co.*
A. de M. *Appeal dismissed.*

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PRIVY COUNCIL.

(On appeal from the High Court of Judicature at Patna.)

PRESENT :—THE LORD CHANCELLOR, LORD JUSTICE WARRINGTON AND CHIEF JUSTICE ANGLIN.

Jagadishwar Narayan ... *Appellant**
v.
Muhammad Haziq Hussain and others ... *Respondents.*

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Jagadishwar Narayan *v.* Md. Haziq Hussain.

Bengal Revenue Sales Act (XI of 1859), Ss. 2, 3, 6 and 33—Revenue when due—Last dates for payment of arrears—Auction-sale in default—Legality questioned—Misdescription of property in notice—Appeal to Commissioner—Substantial injury—Suit to set aside sale.

The Board of Revenue, in pursuance of S. 3 of the Bengal Revenue Sales Act (XI of 1859), had fixed as the last dates for the payment of arrears of revenue the 7th June, 28th September, 12th January and 8th March respectively in each year in respect of the several quarterly instalments. The co-parceners of a certain residuary share in a mahal defaulted in the payment of the June instalment of Rs. 1-11-9 and accordingly on the 5th August following (1917) the Collector issued a notification for the sale of the property, containing on the face of it the statement—"The shares have been noted on the reverse; no share other than the *ijmali* share noted herein shall be sold"; but in fact, on the reverse, the property to be sold was incorrectly described as measuring 17 cottas, 12 dhurs instead of 2 bighas, 15 cottas, 12 dhurs. At the auction held on the 24th September, 1917, the appellant purchased the property for Rs. 850, and on the 29th April, 1918, was put in possession thereof. The co-parceners in the meantime, on the 10th December, 1917, preferred an appeal to the Commissioner of Revenue under S. 33 of the said Act, but did not specify therein or prove any irregularity other than the above misdescription, or any substantial injury accruing to them in consequence thereof, but they alleged hardship. The appeal was dismissed. In February, 1919, they instituted an action for setting aside the said sale, alleging in their plaint *inter alia* that the name of the mahal and the details of the arrears of revenue (*sadar jama*) had been wrongly entered in the notification for sale, but not disputing that the revenue in respect thereof was in arrears on the 7th June, 1917.

Held, (1) that though the last date for the *payment* of the arrears under S. 3 of the Act, and the rules of the Board of Revenue was the 7th June, the revenue in question appeared, both by the Collector's records and by the fact that no allegation to the contrary had been made by the respondents in either their appeal to the Commissioner of Revenue, or in their plaint in this suit, to be really *due* at some date prior to the 1st June, 1917, and was in arrears

*P C Appeal No. 124 of 1924. 30th July, 1926.

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immediately thereafter, under S. 2 of the Act, so that a sale on the 24th September, 1917, was regular. *Haji Buksh Elahi* v. *Durlav Chandra Kar*, (1912) L R 39 I A 177 referred to. (2) Under S. 33 of the Act, the respondents' suit must be dismissed for (*a*) the Collector's notice of sale of the 5th August, 1917, plainly indicated that the whole of the residuary share (the *ijmali* share) was about to be sold, the *sadar jama* specified on the face of it being also the amount in arrears in respect of the whole residuary share, and though an error occurred in noting on the reverse of the notice the particulars of the area of the property, it was an error only in the exercise of the Collector's powers, and had no effect on his jurisdiction; (*b*) the omission to make such an error the ground of an appeal to the Commissioner barred its being raised in the present suit; and (*c*) no substantial injury had been alleged to result from the trifling error mentioned to warrant the sale being set aside as against a purchaser bidding freely at a revenue sale. *Mahant Krishna Dayal Gir* v. *Syed Abdul Gaffar*, (1917) 2 Pat L J 402 (F B) disapproved; *Ravaneshwar Prasad Singh* v. *Baijnath Ram Goenka*, (1914) L R 42 I A 79 and *Rajah Gobind Lal Roy* v. *Ramjanam Misser*, (1893) L R 20 I A 165 at 175 referred to.

Appeal from a decree of the High Court (Das and Macpherson, JJ.), dated the 13th August, 1923, affirming a decree of the Subordinate Judge, Monghyr (Kamala Prasad, Esq.), dated the 31st January, 1920.

The facts and arguments appear from the judgment of their Lordships and from the head-note above.

S. Hyam for appellant.

A. H. R. Majid for respondents.

30th July, 1926. The Judgment of the Board was delivered by

Lord Chancellor.

THE LORD CHANCELLOR :—This is an appeal from a decree of the High Court of Judicature at Patna affirming a decree of the Subordinate Judge of Monghyr, by which a sale of certain land under the Bengal Land Revenue Sales Act (XI of 1859) was set aside as invalid.

The suit related to a portion of an estate known as Chak Maharuddin Khatik bearing No. 3309 on the Tauzi of the Collectorate of Monghyr, and paying an annual revenue to the Government of Rs. 129-13-0. The estate had belonged to a number of proprietors in several shares, but in respect of some of the shares separate accounts had been opened under S. 11 of the Act, leaving a residue belonging to the respondents jointly and bearing an annual revenue of Rs. 80-9-0 payable by quarterly instalments. By a rule made by the Board of Revenue under S. 3 of the Act, the latest dates for the payment of all arrears of revenue in respect of this and other estates had been determined to be the 7th June, 28th September, 12th January and 28th March.

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It appeared by the books of the Collector of the district, that on the 7th June, 1917, the sum of Rs. 1-11-9 was in arrear and unpaid in respect of the residuary share of the estate belonging to the respondents jointly, and accordingly on the 5th August, 1917, the Collector gave notice in accordance with the Act that the *ijmali* (or joint) share constituting the residue of the estate would be put up for sale by auction on the 24th September, 1917, for the arrear of revenue; and at the auction held on that date the appellant was the highest bidder for the share and was declared the purchaser at the price of Rs. 850.

On the 10th December, 1917, some of the respondents preferred an appeal to the Commissioner of Revenue under S. 25 of the Act against the sale, alleging a number of irregularities in the sale (none of which are now relied upon) and that it was a hardship that property which they alleged to be worth a very large sum should be sold on account of an arrear of only Rs.1-11-9 for Rs.850. The Commissioner, having heard the appeal, found on the 8th February, 1918, that no material irregularity had been disclosed or indeed pressed in argument; as regards the plea of hardship, he said that the then appellants appeared to be habitual defaulters and that accordingly he felt precluded from making a recommendation to the Board on the ground of hardship. The appeal was accordingly dismissed, and the appellant paid his purchase-money and was let into possession of the property on the 29th April, 1918.

On the 7th February, 1919, the present suit was instituted by some of the respondents against the appellant, praying that the sale might be set aside, the other respondents (who had been co-proprietors with the plaintiffs) being made co-defendants. The Subordinate Judge framed issues for trial, of which the following only are now material:—

"9. Whether there was any arrear due in respect of the kist for which the sale took place ?

"10. Is the sale liable to be set aside ?"

The suit was heard by the Subordinate Judge who, on the 31st January, 1920, delivered judgment, holding that the sale was void on two grounds. First, he held (under issue 9) that the sum of Rs. 1-11-9 in respect of which the sale was made, did not become payable under the settlement and kistbundi of the mahal until the 7th June, 1917, and accordingly did not become an arrear under S. 2 of the Act until the 1st July, 1917; and this being so, he held that the latest date for payment of the arrear under S. 3 of the Act was the 28th

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September, and accordingly that the sale on the 24th September was irregular. Secondly, he held (under issue 10) that one of the mauzas included in the property sold, which was described in the notification of sale as containing 17 cottas, 19 dhurs, in fact contained 2 bighas, 15 cottas, 12 dhurs, and accordingly that the sale must be deemed to be a sale of a portion only of the residuary share and not of the whole, and was therefore made without jurisdiction. He accordingly made a decree setting the sale aside.

On an appeal by the first defendant (the present appellant) to the High Court at Patna, that Court (consisting of Das and Macpherson, JJ.) disagreed with the Subordinate Judge on the first ground of his judgment, holding on the documents that there was an arrear in respect of which the 7th June, 1917, was the latest day for payment. They further held that in any case this objection, not having been taken on the appeal to the Commissioner of Revenue, was not open to the plaintiffs in the suit: Upon the second point dealt with by the Subordinate Judge the Court held itself bound by the decision of a Full Bench of the High Court in *Mahant Krishna Dayal Gir* v. *Syed Abdul Gaffar* (1) to affirm the decision of the Subordinate Judge; and accordingly, while expressing their dissent from the decision in the case cited, and agreeing with the dissenting judgment of Chapman, J., in that case, they dismissed the appeal. It is against this decision of the High Court that the present appeal is brought.

With reference to the first ground upon which the learned Subordinate Judge rested his decision, their Lordships agree with the High Court in holding that it has no foundation in fact. Their Lordships entirely accept the contention, put forward on behalf of the respondents, that if the sum in question in fact became payable on the 7th June, 1917, it did not become an arrear under S. 2 of the Act until the 1st July, and that in that case the latest date for payment under S. 3 of the Act and the rule made by the Board of Revenue was the 28th September, so that a sale on the 24th September was irregular. This view of the law is in accordance with the decision of this Board in *Haji Buksh Elahi.* v. *Durlav Chandra Kar* (2). But the argument depends for its validity upon the assumption that under the settlement and kistbundi of the mahal the amount in question did not become payable until the 7th June, 1917, and for the reasons given

1. (1917) 2 Pat L J 402 (F B).
2. (1912) L R 39 I A 177: 23 M L J 206 (P C).

by the learned Judges of the High Court their Lordships do not accept that assumption. The result of an examination of the Collector's books, of the grounds of appeal to the Commissioner of Revenue and his replies, and of the pleadings in the suit, is to make it plain that the sum in question became due at some time before the 1st June, 1917, and so became an arrear on that date; and if so, the latest date for payment of the amount under S. 3 of the Act and the rules of the Board was the 7th June, 1917, so that a sale on the 24th September was regular. Upon this view of the facts it is unnecessary to consider whether, if the sale had been shown to be premature, S. 33 of the Act would have been an answer to this objection.

The second ground taken by the learned Subordinate Judge in his judgment is of a different nature. It appears to be the fact that, while the property offered for sale, namely the *ijmali* share which formed the residue of the estate, was correctly described on the face of the notice of sale, and the revenue payable in respect of it (namely Rs. 80-9-0) was correctly given, there was an error in the details of the area of the property noted on the reverse side of the notice, this error amounting to about 1 1|2 bighas out of a total of 158 bighas. It was not alleged or proved that the price given for the property was affected by the misdescription, nor was the point raised on the appeal to the Commissioner; but it has nevertheless been held on the authority of the previous decision of the High Court that the misdescription was sufficient to invalidate the sale. The correctness of the decision under this head depends upon the effect to be given to S. 33 of the Act of 1859, which provides as follows :—

"No sale for arrears of revenue, or other demand realizable in the same manner as arrears of revenue are realizable, made after the passing of this Act, shall be annulled by a Court of Justice except upon the ground of its having been made contrary to the provisions of this Act, and then only on proof that the plaintiff has sustained substantial injury by reason of the irregularity complained of: and no such sale shall be annulled upon such ground, unless such ground shall have been declared and specified in an appeal made to the Commissioner under S. 25 of this Act; and no suit to annul a sale made under this Act shall be received by any Court of Justice unless it shall be instituted within one year from the date of the sale becoming final and conclusive, as provided in S. 27 of this Act."

At first sight this section appears to be a complete answer to this part of the case. The effect of it is that, in order that a sale may be annulled by the Court, a plaintiff must prove (1) that the sale was made contrary to the provisions of the

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Act, (2) that he had sustained substantial injury by reason of the irregularity complained of, and (3) that he specified the irregularity in question in his appeal to the Commissioner; and in the present case, while it may be assumed that the sale under an inaccurate description was contrary to the provisions of the Act, it is plain that the plaintiffs proved no substantial injury by reason of the misdescription and did not raise the point before the Commissioner. But it was held in the case cited, which the High Court felt itself bound to follow, that the section had no application to such a case ; and the point for decision is whether that view is correct.

In the case cited [*Mahant Krishna Dayal Gir* v. *Syed Abdul Gaffar* (1)], as in the present case, the residuary share of an estate was offered for sale and the *sadar jama* of the residuary share was correctly stated in the notice of sale; but an error was made in stating the particulars of the property, a small interest being omitted from those particulars. An appeal to the Commissioner had failed as having been preferred out of time, and on a suit being brought to set aside the sale, it was not proved that the error had seriously prejudiced the sale ; but the Full Bench, holding that the Collector must be taken to have offered for sale less than the whole amount of the residuary share and that he had no jurisdiction so to do, set the sale aside. In other words, they held (as Das, J. put it in his judgment in the present case) that the existence of the Collector's jurisdiction to sell, and not its exercise only, was affected. No doubt that decision covered the present case, and the High Court was under an obligation to follow it ; but in their Lordships' opinion the decision cannot be sustained. In that case, as in this, the notice showed plainly the intention of the Collector to offer for sale the whole of the residuary share ; for the expression "the *ijmali* share" which appeared upon the face of the notice, denotes (as Chapman, J. said in the case cited) the rights of those proprietors who have not opened separate accounts. Further, the *sadar jama* specified on the face of the notice was the amount payable in respect of the whole residuary share. The intention to offer the whole residue for sale was, therefore, clear ; and although an error occurred in noting on the reverse side of the notice the particulars of the area of the property, that was an error in the exercise of the Collector's powers and had no effect on his jurisdiction. This being so, it might have been

1. (1917) 2 Pat L J 402 (F B).

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made the subject of an appeal to the Commissioner, and the omission to specify the point as a ground for that appeal is a bar to its being raised in suit. The point is stated with admirable lucidity in the judgment of Das, J., with which Macpherson, J., concurred; and their Lordships are entirely satisfied with his reasoning on this point.

It is only necessary to add that it would be regrettable if the title of a purchaser under the Act of 1859 were liable to be impeached by suit in respect of a trifling error which is not proved [as in *Ravaneshwar Prasad Singh* v. *Baijnath Ram Goenka* (3).] to have substantially affected the price given for the property. As was pointed out by the Board in *Rajah Gobind Lal Roy* v. *Ramjanam Misser* (4) the first persons to suffer by such an interpretation of the Act would be the defaulting proprietors, for the effect would be to deter purchasers from bidding freely at a revenue sale.

Counsel for the respondents attempted to raise a further point, based on an alleged breach of duty by one of the defendants in not paying the amount due for revenue ; but this argument, which was negatived by the Subordinate Judge and was abandoned in the argument before the High Court, is not now open to the respondents.

For the above reasons their Lordships are of opinion that this appeal should be allowed, and that judgment in the suit should be entered for the first defendant (the present appellant) with costs here and below, and they will humbly advise His Majesty accordingly.

Solicitors for appellant : *Barrow, Rogers and Nevill.*

Solicitors for respondents : *Chapman, Walker and Shephard.*

A. de M. *Appeal allowed.*

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3. (1914) L R 42 I A 79: 28 M L J 583 (P C).
4. (1893) L R 20 I A 165 at 175: I L R 21 C 70 (P C).

PRIVY COUNCIL.

(On appeal from the High Court of Judicature at Patna.)

PRESENT :—VISCOUNT DUNEDIN, LORD ATKINSON AND MR. AMEER ALI.

Niladri Sahu ... *Appellant**

v.

Mahantan Mahant Chaturbhuj Das and others ... *Respondents.*

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Niladri Sahu *v.* Mahant Chaturbhuj Das.

Hindu Law—Erection by Shebait of temple of annexes thereto—Funds procured by loans—Loans discharged by borrowing on mortgage at lower interest—Validity of mortgage—Legal necessity.

The Shebait of a temple, in order to raise funds for the erection, as annexes to it, of a lodging-house for rich disciples and a dining-hall for Sadhus, borrowed from 1891 onwards from money-lenders various sums amounting to Rs. 9,337, repayable with interest at the rate of 2 per cent. per mensem. Subsequently, in order to pay off this debt, which, with accumulated interest, amounted in 1906 to Rs. 25,000, he raised the amount by mortgage of certain *debottor* properties, interest being stipulated at the rate of 1 per cent. per mensem only. When this mortgage-debt was not repaid, the mortgagee instituted an action, claiming both personal and mortgage-decrees against the Shebait. The latter filed his written statement (which he did not, however, attend the trial to support) contending that the mortgage was invalid by reason of the absence of legal necessity for borrowing, or for the erection of the annexes.

Held, reversing the judgment of the High Court, that, even admitting that the original loan was not contracted from legal necessity (which was not demonstrated), the endeavour to discharge it and reduce the interest by means of a mortgage on less onerous terms was sufficient indication of existing legal necessity to validate the mortgage.

Prosunno Kumari Debya v. *Golab Chand,* (1875) L R 2 I A 145 referred to.

Appeal from a decree of the High Court (Jwala Prasad and Foster, JJ.), dated the 17th March, 1923, which dismissed an appeal from a decree of the Subordinate Judge of Cuttack (S. C. Mittra, Esq.), dated the 28th February, 1922, who, in the appellant's suit on a mortgage, had passed a money decree only against respondent No. 1 (the mortgagor), but had refused a mortgage decree.

The material facts appear from their Lordships' judgment.

L. de Gruyther, K. C. and *E. B. Raikes* for appellant.— The building of the annexes was necessary and beneficial to the Math, and, consequently, the debt incurred by borrowing therefor was incurred for legal necessity. It was further beneficial to the Math to have the prior debt at exorbitant interest extinguished and replaced by an equivalent debt

*P. C. Appeal No. 81 of 1924. 6th July, 1926.

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at a reduced rate of interest; and the mortgage which effected this was therefore executed for legal necessity. This term "legal necessity" must be interpreted according to the special circumstances of each case and occasion [*Prosunno Kumari Debya* v. *Golab Chand* (1)]. The onus of proof that the expenditure was profitable to the Math was not on the appellant, as the Indian Courts wrongly held ; it lay, on the contrary, on the respondent to establish that it had not been profitable, and, in fact, they should have presumed that the outlay had been profitable from the respondent's refusal or failure to produce the books of the Math or to give evidence. Those Courts should have decided all the issues in favour of the appellant, and given him a mortgage-decree, or in any event have appointed a Receiver of the Math income, with directions to pay all surplus income to the appellant.

W. Wallach for respondents.—The concurrent findings of fact of the Lower Courts that (i) the property mortgaged is not respondent 1's, but is *debottor* property of the deity. (*ii*) the mortgage was not executed for legal necessity and for the benefit of the Thakur, (*iii*) the alleged debts anterior to the mortgage were not for legal necessity and for the benefit of the idols, are correct, and cannot be disturbed. The decision of the first issue by the Subordinate Judge is also correct that the suit should be dismissed because the Thakurs, who were necessary parties, had not been impleaded as defendants; and the decision of the High Court on this issue was erroneous. The appellant's suit for a decree for sale on the mortgage was rightly dismissed.

6th July, 1926. The Judgment of the Board was delivered by

Lord Atkinson

LORD ATKINSON :—This is an appeal from a decree of the High Court of Judicature at Patna, dated the 17th March, 1923, dismissing an appeal from a decree of the Subordinate Judge of Cuttack, dated the 28th February, 1922, who in a suit for sale on a mortgage had passed a money decree only against defendant No. 1, but had, in other respects, dismissed the plaintiff's claim.

The defendant, the mortgagor, is the Mahant of the Math of a Thakur or deity of the Vaishnavites called Sri Jagannath Mahaprobhu at a place called Puri. It includes a temple with idols in it. The defendant, with, as it is alleged, the view of increasing the income of the Math, built as an addi-

1. (1875) L R 2 I A 145.

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Niladri Sahu v. Mahant Chaturbhuj Das.

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tion to it a lodging house, where Rajahs and other rich devotees visiting the Math might obtain during their visit comfortable lodgings, and built in addition a large hall where food might be supplied to those devotees who might visit the Math and worship at it.

The revenue of the Math, though sufficient to meet the ordinary expenses of the worship in it, was insufficient to meet in addition the cost of the construction, maintenance and management of these new buildings. The defendant was accordingly, from the year 1891 downwards, obliged to borrow from time to time from money-lenders on notes of hand, setting forth the purpose of the loans, various sums of money, bearing interest at Rs. 2 per mensem or more. The actual sum expended on the construction of these pucca buildings, as they were styled, only amounted to Rs. 9,337; so that the outlay could not be considered to have been of an extravagant character. Owing, however, to the very high rate of interest charged by the lenders, the defendant's indebtedness to these latter amounted by November, 1906, to the large sum of Rs. 25,000. To meet this indebtedness, the defendant, the Shebait, on the 6th November, 1906, borrowed from the plaintiff the sum of Rs. 25,000, bearing interest at a rate only equal to one-half the rate he had been paying on the loans obtained from moneylenders, namely, 1 per cent. per mensem, and in order to secure the repayment of this loan and the interest accruing upon it, he gave to the plaintiff a mortgage of certain properties which were at the time, and still admittedly are, *debottor* properties belonging to the Math, and not to any extent or in any respect the properties of the defendant. These properties are enumerated and described in a schedule attached to the mortgage deed.

As the defendant, on some very unconvincing excuse of illness, obstinately refused to appear as a witness at the trial of this case before the Subordinate Judge at Cuttack, or to examine any witness on his own behalf, or to produce his books, though he had been summoned to produce them, it becomes necessary to extract from the mortgage deed a lengthy extract detailing what was the defendant's real action and what were his objects in undertaking to build a pucca building of the manner described. As he executed the mortgage deed, he must be bound by this narrative, despite his embarrassing refusal to give evidence, to examine any witness in his behalf; or to produce his books, which of all things were of the most importance, as they must have shown how much of the borrowed

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moneys was spent in building the pucca houses and how much on the ordinary service of the Muth.

The extract referred to runs as follows:—

"That ere this I had borrowed money from several *mahajans* for the *amritomonohi* expenses of Sri Jagannath Mahaprobhu, for the *seba* and *puja* of the *Thakur* in Barsanth Muth in my *marfatdari* situate in Markandeswar Sahi, Town Puri and to meet other necessary and legitimate expenses in connection therewith. Being unable to pay the principal and interest and being in urgent need of money to preserve Muth properties, to increase the profits accruing therefrom and to improve the condition of the said Muth, I borrowed Rs. 20,000 by a registered bond dated the 18th July, 1902, from Bhikari Misra and others of Markandeswar Sahi, Puri, in order to pay off the aforesaid legitimate debts and to build the pucca one-storied and two-storied buildings and lodging houses, etc., of the Muth. With that amount I paid off the debts heretofore contracted for the legitimate expenses of the Muth and the balance I spent for the pucca buildings and kachha houses of the Muth and for the *amritomonohi* expenses of Sri Jagannath Mahaprobhu and the *Thakurs* of the Muth. Being unable to pay regularly the interest of Rs. 300 a month due on the said sum of Rs. 20,000 and to pay off the principal and interest, though repeatedly called upon by the creditors, I requested you to lend money. As you agreed to lend me Rs. 25,000 at a low rate of interest, *i. e.*, at Re. 1 per cent. per mensem for the Thakurs, I have thought of paying off the principal and interest due on the said registered unsecured bond dated 18th July, 1902. As the said amount was borrowed for the Thakurs and for the preservation and improvement of the properties of the Thakurs, I hereby mortgage to you the properties of the Thakurs as security for payment of the amount which I borrow from you. To pay off the said principal and interest the Thakurs, the Muth and I personally remain liable. On the aforesaid terms I take loan of Rs. 25,000 in cash from you and as to security for payment of the principal and interest I mortgage to you the entire Mouza Durgapur *amritomonohi lakhiraj.*"

It contains also a personal covenant by the defendant, in the following words, to pay the mortgage debt and the interest thereon. It will be found at p. 16, Part III, line 14, and runs thus: "I hereby execute this mortgage bond of my own free will and accord without being influenced by others, and agree that I shall per mensem pay the principal of Rs. 25,000 and interest thereon at 1 per cent. within one year from this date, and redeem the mortgaged property and take back this bond." The properties comprised in the mortgage are enumerated and described in great detail in the schedule annexed to this instrument. They include amongst other kinds of property the two entire Mouzas of Durgapur, 288.36 acres in extent, and include also some land rent free and some let to tenants, and also the entire Mouza Barudi, 644.17 acres in extent. They include a great number of homesteads, of houses, gardens, miscellaneous crops and some waste land, etc., etc. The plaintiff on the 23rd December, 1920, instituted in the Court of the Subordinate Judge of Cuttack the suit out of which this

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appeal has arisen, claiming to recover from the defendant the sum of Rs. 43,114-10-8 due to him for principal and interest under the mortgage deed and praying that a decree might be passed directing the defendant to pay the said sum to the plaintiff within the time prescribed by the Court.

It will be observed that this is entirely a personal claim against the defendant to pay the debt he owes and has covenanted to pay, and the remedy prayed for is a personal remedy against him, worthless most probably to the plaintiff. The plaintiff then prays for alternative relief in the following paragraphs:

"(Kha) That if the defendant 1 does not pay the decretal amount, etc., within the prescribed time or deposit the same in the Court, his right to redeem the mortgaged properties be forfeited and the decree be made final and the mortgaged property be put up to sale and out of the sale consideration the plaintiff may be paid the decretal amount, etc.

(Ga) That if the sale consideration of the mortgaged property be found insufficient for the satisfaction of the decretal amount, etc., due to the plaintiff, the Court may be pleased to pass a decree awarding the balance to the plaintiff from defendant 1 and the other moveable and immoveable properties of Barsanth Math.

(Gha) That the Court may be pleased to pass a decree awarding the plaintiff such other relief as he may be deemed entitled to in the justice of the Court."

To this plaint the defendant, the Shebait, filed a long written statement signed by his agent. It begins with the assertion that the plaintiff's claim is wholly false and fraudulent. It contains many statements directly contradicted by the contents of the mortgage and other written documents to which the defendant has put his hand and by which he obtained the loan of the money sued for. It is, on the whole, a mean and mendacious production, and it is not to be wondered at that no witness was put forward, or possibly could be found, to give evidence in its support. On these pleadings several issues were raised. Of these the following five, with the answers to them, are alone relevant:—

1. Is the suit bad for defect of party?

Finding, First Court: Yes.

Appellate Court: No.

2. Was the bond in suit executed for legal necessity and benefit of the Thakur (god)?

Finding of both Courts: Not for legal necessity.

3. Were the alleged debts preceding the bond in suit for legal necessity and benefit of the idol?

Finding of both Courts: Not for legal necessity.

4. Is the plaintiff entitled to a mortgage decree?

Finding of both Courts: No.

5. To what relief is the plaintiff entitled?

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Finding of both Courts: Only a personal decree against the defendant.

The main defences relied upon by the defendant, as the Shebait, were that—

15. There was no legitimate and legal necessity for borrowing the amount of the bond in suit. The said bond is wholly inoperative and invalid according to law against the *amritomonohi debottor* property and the Thakur.

23. The acts of the defendant 1 were not the acts of a prudent manager of the *debottor* property, and by his acts the *debottor* properties have been ruined and wasted and the debts have swelled. No improvement has been made of the Muth or of the *amritomonohi* property.

Had he been examined and properly cross-examined he must have either disproved these allegations in whole or in part; or if he came into the witness box he must have admitted that these pucca buildings were wholly useless and of no benefit to the Muth, though for nine or ten years he had continued to construct them, or that they were—some of them actually within the Muth—part of the Muth and were functioning wholly to the benefit of the Muth in the way he had hoped, designed and intended they should function; and if he admitted this latter, he would then, if properly cross-examined, have been required to explain upon what principle of justice or equity, when they functioned in the way above mentioned, he refused to pay the man whose money built or helped to build them—the money had been lent him. His excuse for not coming forward as a witness in obedience to a summons served upon him was that he was ill, of what disease he did not say. No medical evidence was given to support that excuse. But his books were not ill. They must have shown how the money borrowed by him had been applied, how much of these loans had been expended for building the pucca houses, and how much, if any, for the services of the idol and the general expenses of the temple. It certainly looks as if the design of the defendant was not to have this case decided on a full examination of all the relevant actual facts involved in it, but to keep from the knowledge of the judicial tribunals all the relevant and decisive information touching the enterprise from which the action springs. In the result, as might have been expected, not a particle of evidence was produced to prove any one of the allegations of fact contained in these defences. It would appear to their Lordships that this case proceeded as if, in some degree, all the loans discharged by the Rs. 25,000 lent on the mortgage had been spent in constructing the pucca houses. This is an entire mistake. Fortunately, in the interest of justice, the plaintiff has been able to secure several

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documents dealing with several of these loans. These documents, 13 in number, will be found in the Appendix, Part III, from page 2 to page 13, inclusive. Two of them, bonds dated the 28th March, 1891, and 23rd March, 1895, deal with loans expressed to be contracted to pay for the *amritomonohi* expenses and "my" (*i. e.*, the defendant's) Muth, and both are signed by the defendant.

A bond, dated the 25th June, 1896, deals with a loan of Rs. 1,300 to meet the daily *amritomonohi* of the Muth and to purchase stones, wood, bamboo, and other materials. This bond and all the following are signed by the defendant. The next is dated the 28th August, 1897. Its opening sentences are worth repeating. They run thus: "Being in need of money to pay the cost of the timber and fees to the Rajah of Baramba for making beams, etc., for the pucca building which I am constructing on the Sadar Danda of the Muth, I borrowed ere this from your Stridhan through your husband on the 9th June of the current year Rs. 200, on the 30th Rs. 200, on the 3rd July Rs. 82, and on the 24th July, Rs. 200. Being in further need of money for current expenses, I take loan from you of Rs. 318 in cash out of your Stridhan through your husband." Another bond, dated 28th Aug., 1897, sets out that on the 25th June, 1897, Rs. 200 were borrowed on a registered bond, that being in further need of money to meet the cost of litigation and the daily *amritomonohi* expenses, the defendant borrows an additional sum of Rs. 1,000 at interest at Rs. 2 per cent. per mensem. On the 19th September the defendant executed a bond borrowing Rs. 3,000, being in need of money to construct pucca buildings of the Muth, and to meet *amritomonohi* expenses. On the 9th November, 1900, the defendant borrows Rs. 900 at 3 per cent. per mensem, "being in need of money to construct pucca, etc., of 'my' (*sic*), Muth and to carry on the Bhog, etc., of Sri Jagannath Mahaprobhu."

On the 3rd December, 1900, the defendant borrows Rs. 2,500 on note of hand for expenses the same as those last mentioned, and on the 28th of the same month the defendant executes a bond for the loan of Rs. 470 for *amritomonohi* expenses of his (*sic*) Muth and the construction of pucca buildings. On the 26th January, 1901, he borrowed on bond Rs. 200 for the necessary expenses "of my (*sic*) Muth." On the 18th July, 1902, the defendant signs a document enumerating the sums he had borrowed up to Rs. 4,900 for the purpose of carrying on the *amritomonohi* expenses of Sri Jagannath

Mahaprobhu, and for the construction of the pucca building and the kachha dilapidated houses of the Muth, as well as other legitimate expenses, and then takes a loan of Rs. 8,808 which, together with the enumerated sums, brings up his indebtedness to Rs. 20,000, for which he signs a bond.

These details are in agreement with the statements of the defendant contained in the mortgage deed of the 6th November, 1906. As to the various sums secured by bond for which he admits he was indebted, the plaintiff was examined on his own behalf and cross-examined at considerable length. Three additional witnesses were also examined on his behalf. The plaintiff proved that the defendant borrowed the sum of Rs. 29,000 from him, Rs. 25,000 of which was secured by the mortgage bond and Rs. 4,000 by a single bond. This sum of Rs. 29,000 was, he said, paid over to Bhikari Misra, a former creditor of the defendant; that he, the plaintiff, made inquiries about these loans, which his money satisfied, and learned that the money borrowed was used to pay for the pucca buildings and for the expenses of *amritomonohi* or Jagannath Deo's services, and that the pucca buildings were situated ten Bakhray towards the southern side of the Muth. The Baisnabs are fed there, he said, on the festival occasions of Jagannath and Markanda; that one of the stone-houses was built near the temple of the Thakur; another house, the kachha house, was built inside the Muth, where the Baisnabs and pilgrims stayed. The pucca two-storied house, he said, was built for the Raja disciples of the Muth. The Baisnabs, he says, stay there during Dol and Gundicha occasions of Jagannath Deo. Barakhendi and Baramba Rajas, he says, lived in the two-storied house, that he saw them there, that he lived there for fourteen or fifteen years, and lives at present in a house only 200 cubits off the Muth, that he asked the defendant to produce the papers. He says he lived near the Muth from his childhood. He says he inspected the *jama kharach* books from 1891 or 1892 to 1902 or 1903. They contained, he said, the income and expenditure of the Muth from all sources, including borrowings. He said the borrowings were entered, and the previous tahabil was almost nil, and he saw the expenses of the several necessities day by day. Afterwards 10 Bakhras houses, he said, were built in 1892 or 1893, the two-storied house in 1895 or 1896, the kachha house in 1898 or 1899. He says that before these years Baisnabs came and lived and were fed in houses that got broken in the meanwhile. He states positively that the defendant, the

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Shebait, said that Maharajas and Rajas gave properties to himself and to the Muth. The evidence of the other witnesses corroborates this, and is consistent with that of the plaintiff.

Nothing of importance was elicited from these witnesses on cross-examination. It appears to their Lordships that the fair inference to be drawn from this uncontradicted evidence, coupled with the mortgage and the bonds already referred to, is that the building project which the defendant promoted has been successfully effected by the use of a portion of the moneys borrowed by the defendant; that it has been completed in great part if not entirely; that it is functioning as contemplated by its author; that the Muth is to a great extent benefited by it, in that worshippers are more numerous and of a richer class than theretofore—visited the Muth for devotional purposes, attracted presumably by the increased and more civilised accommodation the new buildings afford.

Their Lordships think that this evidence completely refutes the statements of facts upon which the main defence put forward by the defendant rests.

A partition suit was instituted between the plaintiff and his brothers, and the brothers were consequently made formal defendants in this suit, the real defendant who contracted the loan being styled defendant No. 1; but the Sub-Judge, quite properly, put the claim for partition aside, and the Shebait was therefore referred to as the defendant No. 1. This learned Judge, in delivering judgment, said:

"When it is clear that the properties (*i. e.*, the properties mortgaged) do not belong to the defendant No. 1, but to the Thakurs, and when the bond in suit was not executed by the defendant No. 1 in his capacity as *marfatdar* of the Thakurs, and if when the decree is to be passed against these properties it is only necessary that Thakurs should have been parties to the suit and should have one opportunity of refuting the allegations of circumstances made by the defendant No. 1 personally, which made the bond to all intents and purposes obligatory upon them. Thus the Thakurs are necessary parties to this case."

He said he thought the objection fatal to the suit, and decided that it should stand dismissed.

The Sub-Judge then proceeded to say that after this finding he was not called upon to decide upon the other issues raised in the case, and then proceeded to express himself thus:—

"But as I have recorded evidence I think it would not be amiss if I make findings on them. The necessities alleged are building expenses of the Muth, *amritamonohi* expenses and feeding of Sadhus. Pucca buildings were made where there were kachha sheds and a two-storied building added to the Muth for Maharaja and Raja disciples. There is no evidence that kachha sheds would have done for old dilapidated sheds of that nature.

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There is no evidence also that Maharaja and Raja disciples of the Muth refused contributions to the Muth without a two-storied building. In fact, in my opinion these were not necessities at all but were raised to show to people that the Muth is a rich and big Muth. In these circumstances these buildings cannot be regarded as necessities of the Muth. Then as regards *amritemonohi* expenses, the defendant No. 1 fell short of his fund for *amritamonohi* purposes as all the money of the Muth cannot be absorbed in the *pucca* buildings erected, which was done to satisfy either his own vanity or for speculative purposes. The shortage of *amritomonohi* expenses therefore cannot come under the head of legal necessity at all. Besides there is no evidence to fix the amount of the *amritemonohi* expenses borrowed. As for expenses for feeding Sadhus for the same reason cannot come in the category of legal necessity. There is also no evidence to fix the exact amount of it.

It did not occur to the learned Judge that but for the convenient illness of defendant all the information he desired could have been supplied to him by the opportune invalid. He then proceeds to add that after making the order he consulted the pleaders, and was convinced by them of what would be apparent to the merest tyro in the profession—that a personal decree should be made against the defendant for money only.

The High Court point out that the Sub-Judge had decided in favour of the plaintiff that the suit was not barred by limitation, and that this finding was not challenged before them, but that he did decide questions 1, 2, 3, 4 against the plaintiff on the ground that the Thakurs were necessary parties, and not having been impleaded, the suit was defective; that there was no legal necessity for the loan to the Thakurs so as to entitle the defendant No. 1 to mortgage the properties in question ; and that the loan did not in any way benefit the Thakurs. The learned Judges in the High Court held that it was obvious that defendant No. 1 was sued in his representative capacity, and that therefore the deity was not a necessary party, and that the Subordinate Judge's decision on that point was erroneous.

These learned Judges, after referring to the several debts mentioned in the mortgage bond, which the borrowed money, Rs. 25,000, was applied to liquidate, set forth the grounds of their decision in the following passages of their judgment. Referring to the plaintiff's evidence, they say:

"The most important of these necessities is said to be the construction of *pucca* buildings. It is said by the plaintiff that the *pucca* two-storied buildings were required for the Raja-disciples of the Muth, such as Raja of Bamra and Barakhendi and during the *Dol jatra* and *Rath jatra* occasions these buildings are used for the putting up of Vaishnavas. One two-storied building, the plaintiff says, was built as the temple of the Thakur. One *kachha* house was also built inside the Muth where Vaishnavas and pilgrims stay. In cross-examination he says that he heard from defendant No. 1 that the Maharajas

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and Rajas gave properties to himself and to the Muth. From this it is argued that the aforesaid buildings were necessary for the comfort and convenience of the disciples of position of the Muth and possibly that might increase the offerings made to the deity and thus the buildings were calculated to increase the income of the property. The learned Subordinate Judge says that there is no evidence that the Maharaja and Raja disciples of the Muth refused contributions to the Muth without a two-storied building and that these buildings were not necessities at all but were raised to show to people that the Muth was a rich and a big Muth. It may have been desirable or even commendable on the part of the Mahant to construct such luxurious buildings for the comfort and convenience of the Raja disciples if this could be done out of the savings of the income of the Muth properties. But the construction of such buildings cannot be considered to be such pressing necessities as to justify the construction of them by raising loans. The actual loan taken from 1891 up to 1906 to meet the necessary *amritomonohi* expenses and the construction of the *pucca* buildings amounted to about Rs. 9,337 and the interest even after payment from time to time swelled the amount of the loan to Rs. 25,000, for which the bond in suit was executed. In the previous loans the exorbitant rate of interest such as Rs. 5-2-0, Rs. 2 was stipulated for. Where was the necessity for borrowing at such high rate of interest? The considerations for the loan look very much like speculations, and howsoever advantageous it may be the Mahant was not entitled to launch into such speculations by borrowing money at high rates of interest. Therefore the construction of buildings in question was not a pressing necessity for which the Shebait, defendant No. 1, could mortgage the properties of the Thakur at high rates of interest. The daily expenses of the Muth as well as the *amritomonohi* may have been necessary, but in order to show whether there was necessity to meet these expenses by borrowing, it was incumbent upon the plaintiffs to show that the income of the Muth was not sufficient to meet these necessary expenses. The plaintiffs no doubt summoned the defendant to produce accounts of the income and expenditure of the Muth, but they ultimately failed in this attempt. No doubt inference adverse to the defendant may be drawn from this fact, but the plaintiff's witnesses pose themselves to be acquainted with the ins and outs of the Muth; some of them live very close and say that they saw the *Jam Kharach Bahis* and also satisfied themselves as to the necessity of the loan. It is, however, strange that none of them can give any idea of what the income of the properties was.

* * * * *

The failure of the defendant No. 1 to produce the account books does not very much affect the issues in hand inasmuch as it is not denied, and in fact it has been proved that the money was taken for the purpose of constructing the pucca structures for the Raja disciple and for the Sadhus. The question is not solved by the establishment of that fact alone. It has further to be proved that they were the dire necessities of the time and could not be postponed and that loan must necessarily have been taken to meet them. I therefore agree with the learned Subordinate Judge that there was no legal necessity for incurring the loans in question.

I also agree with the learned Subordinate Judge when he says that the buildings were constructed only to satisfy either the vanity of the defendant or for speculative purposes.

Their Lordships cannot, in the evidence, find a single particle to support this latter allegation. It has been already

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demonstrated that the money borrowed by the defendant was not used solely for the purpose of building pucca houses. Had the defendant given evidence as a witness or produced his books, it would probably have been possible to have ascertained what was the amount of the portions of the loan devoted to building purposes and what to the requisite services of the Muth, and that the plaintiff might reasonably be paid in respect of these latter, but that is not the nature of the defence of the defendant. He first shuts up all avenues through which information could be obtained, and then, because the plaintiff does not make the decision the defendant has made it impossible for him to make, the plaintiff is to be paid nothing. There is another matter. Pucca buildings are situated in part in the Math; they are used by the Math authorities as their own; they are functioning as they were intended to. The defendants and the worshippers use, occupy and enjoy them, but will not pay for them. One could understand razing them to the ground because they were worthless and then refusing to pay for them, but to refuse to pay and yet keep them and use them is a gross injustice and a most unworthy act.

The learned Judges of the High Court appear to their Lordships to be rather of opinion that the procurement of a loan of money on easy terms for the purpose of paying off antecedent loans obtained on very oppressive terms can never, in a case of this character, be held to be a necessary proceeding unless the obtaining of the oppressive loan was, at the time it was obtained, a matter of necessity also.

If these learned Judges held that view, their Lordships cannot agree with them. The case of *Prosunno Kumari Debya* v. *Golab Chand* (1) was decided by a Committee of the Privy Council, composed of Sir James Colvile, Sir Barnes Peacock, Sir Montague Smith and Sir Robert Collier. The respondent obtained two decrees against the former Shebait of an idol upon the latter's bonds for the repayment of moneys alleged and found to have been borrowed for the service of the idol and the expense of the temple. Both decrees directed that the debt should be paid by the Shebait personally, or else realised from the profits of the *debottor* lands.

The appellants were the two succeeding Shebaits of the idol. They instituted a suit to set aside these decrees and to have the *debottor* property released from the attachment issued in execution of the decrees. It was held that the decrees,

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being untainted by fraud or collusion, as they were held to be, and having been passed after the necessary and proper issues had been raised and determined, were entitled to the force due to judgment of competent Courts, and were binding on the succeeding Shebaits who were continuing representatives of the idol's property. Sir Montague Smith, in giving judgment, first pointed out that the case did not come before the Council by way of appeal from the decrees sought to be impeached, but upon a fresh suit to set them aside. He then stated the facts of the case. This Raja Baboo, the appellant, the former Shebait, was, he said, a man of profligate habits, and having spent the income of the *debottor* property on his own pleasure, borrowed Rs. 4,000 from the respondent to repay the expenses of the idol and of repairing the temple. As security for this advance, he gave a bond to the respondent, and also a *vahinama,* by which he pledged the *debottor* property for the payment of the money. In both securities it was stated that the money was needed for the services of the idol and the expenses of the temple. The Judge of the Zillah Court of Dacca gave a decree for the respondent, having found that the money had been borrowed and expended for these purposes, but that the specific pledge of the property could not be enforced, that a decree founded on the bond for the money lent might be given, to be realised out of the *debottor* lands, and he framed the decree. Their Lordships held that they were only sitting to determine the operation and effect of the two decrees as they stood, not whether they were right or wrong on questions of law or fact, and approved a decree in the form suggested. But the learned Judge did not lay down this proposition : that though property devoted to a religious purpose is, as a rule, inalienable, it is, in their Lordships' opinion, competent for the Shebait of property dedicated to the worship of an idol, in his capacity as Shebait and manager of the estate, to incur debts and borrow money for the purposes of expenses in keeping up the religious worship, repairing the temples or other possessions of the idol, defending hostile litigious attacks, and other like objects. The power, however, to incur debts must be measured by an existing necessity for incurring them.

The importance of this case in its application to the present consists in this, that it was the immediate, not the remote, cause, the *causa causans,* of the borrowing which has to be considered. The immediate cause of the borrowing was the Muth's need of money to carry on and pay for its services.

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The remote cause of the Muth's need was due to the profligate expenditure of the Shebait. It would have been no answer to the creditor's suit to say, " Oh, your money was only borrowed because the income of the Muth was spent, by a profligate Shebait, and there was no money available to carry on the services of the Muth." So in the present case. Even if the building scheme of the defendant had been reckless, inconsistent, unsound and liable to fail, which, by the way, has not been proved, what drove him to borrow this money Rs. 25,000 on mortgage, to pay old debts, and so be relieved of the oppressive burden which the exorbitant rate of interest at which these earlier loans were made imposed upon him. It was the high rate of interest, which he was already bound to pay, that was the necessary and immediate cause of his giving this mortgage, though the remote cause of it was the getting into debt by the building operation. In their Lordships' view the principle of the case of *Prosunno Kumari Debya* v. *Golab Chand* (1) applies to this case. They therefore think the appeal succeeds, that the judgment appealed from was erroneous and should be set aside, and that a decree should be pronounced in the form adopted in this latter case, declaring that the debt should be paid by the Shebait personally or else realised from the profits of the *debottor* property.

The case should be remitted to the High Court with the following direction, *viz.* :—

That the High Court should make a personal decree against the defendant for the payment of the debt within a specified time, and on his failure to pay, to direct an enquiry to be held by the Court of the Subordinate Judge as to the sums legitimately attributable to the endowment under the Hindu Law, and a Receiver should be appointed to realise the rents and profits of the *debottor* estate, and the Shebait's share, after payment of a maintenance allowance to be fixed by the Court, should be allocated for the payment of the plaintiff's debt.

Their Lordships will humbly advise His Majesty accordingly. The first respondent will pay the costs of the appeal.

Solicitors for appellants : *Watkins and Hunter.*

Solicitors for respondents: *W. W. Box and Co.*

A. de M. *Case remitted to High Court.*

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1. (1875) L R 2 I A 145.

PRIVY COUNCIL.

(On appeal from the Court of the Judicial Commissioner of Oudh).

PRESENT :—VISCOUNT DUNEDIN, LORD ATKINSON AND MR. AMEER ALI.

Thakur Nirman Singh and others ... *Appellants**

v.

Thakur Lal Rudra Partab Narain Singh and others ... *Respondents.*

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Nirman Singh *v.* Lal Rudra Partab Narain Singh.

Hindu Law—Joint family property—Death of ancestor—Oudh Land Revenue Act (XVII of 1876)—Mutation of names—Alleged adverse possession of eldest son—Younger son's receipt of maintenance—Exclusion from property—Limitation Act (IX of 1908), Sch. 1, Art. 127.

L, the head of a joint Hindu family, died in 1882, leaving him surviving three sons—*A*, who was of age, and *B* and *C*, then minors. *A* thereupon applied under the Oudh Land Revenue Act (XVII of 1876) to the Assistant Commissioner of the District for mutation of names in respect of the deceased's estate in his favour as the eldest son. The Assistant Commissioner ordered that *A* be registered as Lambardar, and his two younger brothers, *B* and *C*, as his co-sharers. On *A's* appeal from this order, the Deputy Commissioner set aside so much of the order as directed the registration of the names of *B* and *C* as co-sharers. They, *B* and *C*, however, remained in occupation of the estate jointly with *A* from their father's death in 1882 until about 1911, when they separated, but received substantial sums from him, as head of the family, for their maintenance. Upon *A's* death in 1916, *C* instituted an action claiming partition of the estate against *A's* sons, who, however, pleaded *inter alia* impartibility of the estate by custom, and limitation on the ground that *C* had been excluded from the property for more than 12 years since 1882, when the mutation of names as above had been effected in favour of their father.

Held, affirming the judgment of the Subordinate Judge, Bahraich, and reversing that of the Court of the Judicial Commissioner, that though *A* acquired and kept physical possession of the estate since 1882, he had not (nor did the aforesaid orders of the Assistant Commissioner and Deputy Commissioner confer upon him) possession as legal owner of the property to the exclusion of the claims of other members of the family. The two Revenue Officers aforesaid had no jurisdiction to adjudicate upon the legal validity of a claim to sole proprietary possession. *Corea* v. *Appuhamy*, (1912) A C 230 referred to. Proceedings for mutation of names are not a judicial proceeding, in which the title to, and the proprietary rights in, immoveable property are determined, but are more in the nature of fiscal inquiries instituted in the interest of the State for ascertaining which of several rival claimants to the occupation of immoveable property may be placed in possession of it, with greater probability that the revenue will be duly paid; and the facts that the younger sons continued in occupation of the estate, and also received maintenance tended to show that *A's* possession was not exclusive of or adverse to his younger brothers for time to begin to run under the Limitation Act (IX of 1908), Sch. I, Art. 127, in his favour against them.

*P C Appeal No. 23 of 1924. 1st July, 1926.

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Nirman Singh v. Lal Rudra Partab Narain Singh.

Appeal from a decree of the Court of the Judicial Commissioner (Ashworth and Simpson, JJ.), dated the 18th September, 1922, which reversed a decree of the Subordinate Judge of Bahraich (M. Hassan Khan, Esq.), dated the 6th July, 1920.

The facts and arguments appear from their Lordships' reasons for judgment.

A. M. Dunne, K. C. and *B. Dube* for appellants.

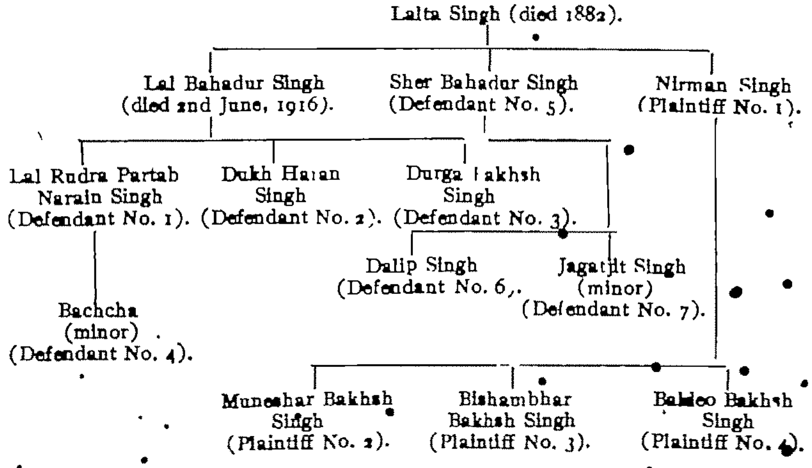
The respondents were not represented.

Their Lordships allowed the appeal, and their reasons therefor were pronounced on the 1st July, 1926, by

Lord Atkinson.

LORD ATKINSON :—This is an appeal from a judgment and decree, dated the 18th September, 1922, of the Court of the Judicial Commissioner of Oudh which reversed a judgment and decree, dated the 6th July, 1920, of the Subordinate Judge of Bahraich. The main question for determination on this appeal is whether the plaintiffs' suit is barred by limitation. The Subordinate Judge held that it is not barred, and the Appellate Court took the opposite view, holding that it was barred. The pedigree of the parties showing their descent from Lalta Singh, who died in the year 1882, the relation between them, and the position they have respectively taken up in the litigation out of which this appeal has arisen, are indicated with sufficient fullness and accuracy in the pedigree as set out in the appellants' case.

It runs as follows :—



The pedigree of the ancestors of Lalta Singh is fully printed at page 29 of the Record.

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The plaintiffs, Nirman Singh, Muneshar Bakhsh Singh, Bishambar Bakhsh Singh and Baldeo Bakhsh Singh, commenced an action against the three sons of Lal Bahadur Singh, since deceased, who died on the 2nd June, 1916, and Bachcha, then 10 years of age, then a minor under the guardianship of his own father, Sher Bahadur Singh, and Dalip Singh. A paragraph of the plaint filed by the plaintiffs sets forth that the parties to the suit are members of a joint Hindu family, governed by Mitakshara Law, and that no partition of any kind has ever been effected between the parties to the suit, or between the ancestors mentioned in their pedigree. In paragraph 3 it stated that Lalta Singh's own brothers died childless; that Lalta Singh thereupon became head of the joint Hindu family and entered into possession of the entire joint property ; that at the time of the death of Lalta Singh, Nirman Singh, plaintiff No. 1, and his brother, Sher Bahadur Singh, were minors and lived with their elder brother, Lal Bahadur Singh, that all the villages held in proprietary possession remained joint property, that mutation of names being effected in favour of Lal Bahadur Singh as the head of this joint Hindu family, during whose life all the members of the family remained as owners in respect of the joint family property ; Lal Bahadur Singh died on the 2nd June, 1916. It was then stated that defendants from 1 to 4 then raised all sorts of disputes and filed objections against the mutation of names, rendering it impossible to live in joint enjoyment of the family property ; that, for this reason, plaintiffs then desired this property should be partitioned amongst the members of the family, but on the 27th November, 1916, defendant No. 1 finally refused to consent to this being done. The share of the plaintiffs in the entire property would, on partition, be one-third, that of defendants Nos. 1 to 4 (also one-third) and that of the defendants Nos. 5 to 7 also one-third.

Defendant No. 5 and his two sons, defendants Nos. 6 and 7, are impleaded as defendants, but in their written statement they admit the validity of the plaintiffs' claim. The principal defendant is Lal Rudra Partab Narain Singh, defendant No. 1. He filed a written statement on the 3rd November, 1917, about 18 months after the death of his father. In his statement he denied that the parties to the suit were ever members of a joint Hindu family, and in paragraphs 15 and 16 of this statement averred that the custom of single ownership had been existing for centuries in the family

of Lal Rudra Partab Narain Singh, defendant No. 1, and that the Bahraich estate since its acquisition had for generation after generation been held by a single owner, that under this custom the property was impartible and owned by a single owner. That the estate was never partitioned in view of the fact that it was impartible, and further that the custom of primogeniture has obtained in the family of defendant No. 1 and that for generation after generation the Bahraich estate had been held and enjoyed by the eldest son in accordance with this custom, while the other children continued to get only maintenance allowance due by way of guzara in accordance with the custom. He further averred that Bahadur Lal Singh, his father, had been in exclusive possession of the estate in dispute from May, 1882, and that even if the plaintiffs had any right to partition, limitation commenced from the date of mutation in 182[illegible], and their claim was barred by time. Defendants 3 and 4 adopted as their own the pleas raised by defendant No. 1.

On these pleadings, the Subordinate Judge framed 20 issues (*see* page 376 of the record, numbered from 1 to 20 both inclusive). He has most conveniently divided them into three groups according to the subjects with which they respectively deal.

The first group consists of the following first two issues :—

"(1) Whether Lal Bahadur Singh and the parties to the suit constitute members of a joint Hindu family?

"(2) Whether the property in suit is joint family property?"

The Subordinate Judge, after having most carefully examining all the evidence, found in the affirmative on each of these issues, and the Appellate Court affirmed his findings.

The second group has comprised the two following issues, Nos. 3 and 4 :—

"(3) Does a custom of impartibility and of succession by lineal primogeniture exist in the family, as alleged ?

"(4) Is the property in the suit also otherwise impartible, as alleged ?"

The Subordinate Judge found these issues against the defendants, and expressed himself thus :—

"Now all the points to be determined in connection with issue No. 3 have been wholly or partly decided in the negative upon a review of all the autho-

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rities cited for the parties and the documentary and oral evidence in the case. I am therefore of opinion that the custom of impartibility and lineal primogeniture pleaded by the contesting defendant is not established, and I find issues Nos. 3 and 4 in the negative."

The Appellate Court concurred with the finding of the Subordinate Judge that the defendants had failed to prove the custom pleaded by them, saying, "Our finding is that the custom is not proved."

The third group consist of the issues Nos. 10, 11 and 12, relating to the raising the plea of limitation. These run as follows:—

"(10) Have the plaintiffs been in possession of the property in suit within limitation?

"(11) Have Lal Bahadur Singh and defendant No. 1 been in adverse possession of the property in suit for more than twelve years before suit?

"(12) If the property in suit be found to be joint family property, then have the plaintiffs been excluded within their knowledge from the enjoyment of it more than twelve years before suit?"

The Lower Courts are agreed in holding that the determination of the question of limitation depends upon the true meaning and application of Article 127 of the 1st Schedule to the Indian Limitation Act (IX of 1908), which is as follows:

Description of Suit.	*Period of Limitation.*	*Time from which period begins to run.*
127. Suit by a person excluded from joint family property, to enforce a right to share therein.	Twelve years.	When the exclusion becomes known to the plaintiff.

The Subordinate Judge tried issues Nos. 10, 11 and 12 together, and, on considering them, he directed his mind to the following considerations:—

"In order to see whether the suit is or is not barred under Art. 127, we have to see whether or not the plaintiffs were excluded from the joint family property more than twelve years before the suit to their own knowledge. The onus of proving not only that they were excluded, but also that they knew that they were excluded more than twelve years before the suit, *i. e.*, before the 6th July, 1905, lay upon the contesting defendants."

The facts relating to the plea of limitation may be summarised thus:—

As already stated, the head of the joint family, Lalta Singh, died in 1882, leaving him surviving three sons, namely, (1) the eldest, Lal Bahadur Singh; (2) the second, Sher Bahadur Singh (defendant No. 5), who was sixteen years old; and (3) the plaintiff, Nirman Singh, who was a minor, fifteen years of age.

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On the 23rd May, 1882, the said Lal Bahadur Singh filed an application under the provisions of Ss. 61 and 62 of the Oudh Land Revenue Act (XVII of 1876), praying that, as he had performed the funeral rites of his deceased father, mutation of names in respect of his father's estate might be made in his favour.

The Extra Assistant Commissioner of Bahraich made the following rather peculiar order on this application:—

"Ordered

that in place of the name of Lalta Singh, deceased, the name of his eldest son, Lal Bahadur, shall be written in the column of Lambardar and the names of (the deceased's) younger sons, Sher Bahadur Singh and Nirman Singh, shall be written in place of the deceased as co-sharers. Let the Tahsildar be informed so that he gives effect to this and collects the usual fee. Let the Registrar Qanungo, the Suddar Qanungo, the *wasilbaqi navis* of the Suddar be informed. If this eldest son, Lal Bahadur, has any objection to the recording of the names of his brothers as co-sharers, and considers them to be entitled to maintenance, he can have his remedy from a competent Court, as according to Hindu Law and custom all the sons of a deceased person are his lawful representatives.

(Sd.) "Pandit Janki Prasad,

"*Extra Assistant Commissioner of Bahraich.*

"Dated 1st June, 1882."

Lal Bahadur was dissatisfied with this order and appealed to the Deputy Commissioner of Bahraich, who made an order equally peculiar. It runs thus:—

"*Order.*

"Such being the facts of the case I accept the appeal from the order of Extra Assistant Commissioner and cancel so much of his order as not register (*sic*) Sher Bahadur and Nirman Singh in the Tahsil Books as proprietors in possession. This order will not, of course, debar them from claiming, should at any time such a course appear to either of them advisable, their share in the estate.

"To-day present applicant and the two minors. Their mother and guardian is not present. Sher Bahadur and Nirman Singh, aged 16 and 15, appear with an application from their mother excusing her appearance at such a distance (35 miles) in this weather, she being a pardanashin. She says in it that the estate has never been divided, and that she has no objection to *dakhil-kharij* in the eldest boy's name, Lal Bahadur's.

"Sher Bahadur, aged 16, declares that the signature to this is his mother's, and was written by her in his presence.

(Sd.) "M. L. Ferrar,

"*Deputy Commissioner.*"

Both the Lower Courts have found that the plaintiff, Nirman Singh, and his brother, Sher Bahadur Singh, have, since their father's death in the year 1882, lived jointly with their eldest brother Lal Bahadur Singh in the ordinary way, and continued so to do up to the year 1911, or thereabouts. Thereafter they resided separately, but received considerable sums of money for their expenses from Lal Bahadur Singh, the

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head of the joint family. The defendants themselves assert that plaintiffs are in receipt of cash maintenance, and that they are in possession of some land in lieu of the same. In view of these facts, the Subordinate Judge held that the plaintiffs' suit was not barred by limitation, and concluded a sound and able judgment in the following words:—

"The last-mentioned case of *Raghunath Bali* v. *Maharaj Bali* (1) makes it clear that even where the person actually holding the property of a joint family believes that it is impartible property, and another member of the family sharing that belief accepts maintenance, it does not amount to the exclusion of the latter, and upholds the authority of the Privy Council in *Rajya Lakshmi Devi* v. *Surya Narayana Dhatrasu Bahadur* (2) that where the junior member under a mistake accepts the provision of maintenance they are not to be deemed excluded as co-parceners. The mere fact that the parties believed that the estate was impartible and the junior co-parceners having a right to share accepted maintenance in lieu, does not put the head of the family in a position adverse to the other members, so as to force them to realise, so to speak, their right of partition or be barred. The cause of action would not arise unless the co-parceners were absolutely excluded, and is not absolutely excluded if he is in receipt of maintenance from the family property. Here it is asserted by the contesting defendants themselves that the plaintiffs are in receipt of cash maintenance, and that they are in possession of some lands in lieu of the same. (*Vide* Exs. A-142 to A-160, A-177 and A-178.)

"The decision of the Madras High Court in *Jaganatha* v. *Ramabhadra* (3) confirmed by the Privy Council in *Jagannadha Rasu* v. *Ramabhadra Rasu* (4) laid down that if the plaintiff in a suit under Art. 127 has lived on the property with other joint owners, and has been supported by the proceeds of the joint family property, this is sufficient to negative his exclusion and to save limitation.

* * * * *

"Exclusion to bar a suit under Art. 127 must be a total exclusion. (*Vide* *Rajya Lakshmi Devi* v. *Surya Narayana Dhatrasu Bahadur* (2), *The Udayarpalayam Case* (5) and *Kumarappa Chettiar* v. *Saminatha Chettiar* (6).]

"In view of these authorities and the facts of the case, I am of opinion that the plaintiffs have not been excluded within their knowledge from the enjoyment of the property in suit for more than twelve years before the suit and that it is within time. I therefore find the issues accordingly against the contesting defendants."

The perusal by their Lordships of the judgment of the Court of the Judicial Commissioner of Oudh, at p. 482 of the Record, leads their Lordships to think that its judgment is to a great degree based on the mischievous but persistent error that the proceedings for the mutation of names is a judicial proceeding, in which the title to and the proprietary rights in immoveable property are determined. They are nothing of the kind, as has been pointed out times innumerable by the Judicial Com-

1. (1885) I L R 11 C 777 (P C). 2. (1897) I L R 20 M 256 (P C).
3. (1888) I L R 11 M 380. 4. (1891) I L R 14 M 237 (P C).
5. (1901) I L R 24 M 562: 11 M L J 191. 6. (1918) 36 M L J 612.

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mittee. They are much more in the nature of fiscal inquiries instituted in the interest of the State for the purpose of ascertaining which of the several claimants for the occupation of certain denominations of immoveable property may be put into occupation of it with the greater confidence that the revenue for it will be paid.

It is little less than a travesty of judicial proceeding to regard the two orders of the Extra Commissioner of Bahraich and Mr. M. L. Ferrar, Deputy Commissioner, as judicial determinations expelling *proprio vigore* any individual from any proprietary right or interest he claims in immoveable property. Yet of these very orders the Court of Appeal at p. 484 of the Record said the Deputy Commissioner decided that Lal Bahadur Singh was alone entitled on the evidence to have his name entered, though he added that his order could not debar the brothers from bringing a suit to establish their claim at any time.

It appears to us that these proceedings afford clear evidence that Lal Bahadur Singh took possession of the estate as property to which he was entitled to exclusive ownership, and not on behalf of the younger brothers. There can be no doubt he had sole physical possession in the sense that he was able to deal with the proceeds, and to exclude all others, and there can be no doubt that he showed a determination to exercise that physical power on his own behalf. He had therefore sole legal possession—yes, in the sense that any person who on an application for mutation of names is put upon the registry as sole occupier will have sole legal possession, whether he be the head of a joint Hindu family, or not head of any family, or an absolute owner. If, however, the Court of Appeal meant by the language they have used that these orders were evidence that Lal Bahadur Singh was in possession as sole legal owner in a proprietary sense, to the exclusion of all claims of the other members of the family as co-owners or for maintenance or otherwise, they, in their Lordships' view, were entirely mistaken. The same evidence finds expression in this passage of the judgment of the Court of Appeal as is manifested in the passage at the top of page 485. After referring to what Lord Macnaghten, in the case of *Corea* v. *Appuhamy* (7) said to the effect that "possession is never considered adverse if it can be referred to a lawful title," they held that there was nothing in that case to show any intention on the part of the deceased owner's heir to enter as a plunderer, and said "That

7 (1912) A C 230.

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case is to be distinguished from the present case by the fact that Lal Bahadur Singh did at the time of entry set up an adverse title in clear terms before the revenue authorities, and *they accepted his claim*. If that means that Lal Bahadur Singh set up a claim to be sole proprietary owner of this estate entitled to an interest in which his brothers had no claim, then these revenue authorities had no jurisdiction to pronounce upon the validity of such a claim, and from these orders it would appear they did not attempt to do so. It is, in their Lordships' view, perfectly clear that the orders already referred to did not effect and were not intended or designed to effect *proprio vigore* an exclusion of the plaintiffs from all interest in the property of the joint family of which they were members. At page 487 the Court of Appeal deals with the point of exclusion. They say it was strenuously argued that the fact that Lal Bahadur Singh's brothers got maintenance and actually held some lands is conclusive proof that they were not, in point of fact, excluded from the estates of Lal Bahadur. A long and rather obscure discussion follows as to the exclusion being intentional or the contrary. It is generally understood in law that a man must be presumed to intend the natural consequence of his own act. The following passage on p. 487, between lines 20 and 30, is the strongest practical comment upon this principle. It runs thus:—

"It must be possible to infer that it was accompanied by an intention to abandon the position of a right to exclude. No doubt such intention will be inferred where no legal title to exclude is proved to have been set up and maintained, because there is always a presumption in favour of rightful entry and retention. Such presumption is, however, rebuttable. Here the facts are these. Lal Bahadur Singh was, as we have found, a co-sharer in point of law. But he was holding under an express assertion of his title to hold as sole proprietor. He gave money and lands to his brothers in the way a sole proprietor would do. Such gifts do not save his brothers from exclusion. The cases cited to us appear to us no authority for the contrary."

On the whole their Lordships are quite unable to concur with the Court of Appeal in the views that Court has taken on all or most of the important points in this case. They think those views are erroneous. The judgment of the Subordinate Judge they, on the contrary, think sound and helpful, and are therefore of opinion that the decision of the Court of Appeal should be set aside, that the judgment and decree of the Subordinate Judge should be affirmed, and this appeal should be allowed with costs, and they will humbly advise His Majesty accordingly.

Solicitor for appellants: *H. S. L. Polak*.

A. de M. *Appeal allowed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE DEVADOSS AND MR. JUSTICE WALLACE.

Narayana Naicken ... *Appellant** (*Plaintiff*)

v.

Venkataswami Naicken and others ... *Respondents.*

Narayana Naicken v. Venkataswami Naicken.

Limitation Act, Art. 12—Applicability—Hindu Law—Joint family—Father—Decree against—Sale of family property in execution of—Suit by son for declaration that his share in the item sold was not affected by the decree and the execution sale, and for possession thereof—Limitation—Private sale of family property by father—Suit by son to recover his share in—Limitation.

The plaintiff and the 2nd defendant were the sons of the 1st defendant, and they, together with the 1st defendant, constituted a joint Hindu family. In execution of a money decree obtained against the 1st defendant, items 1 to 4, which belonged to the joint family, were sold and were purchased by the 3rd defendant who took delivery of them. Neither the plaintiff nor the 2nd defendant was a party to the suit in which the said money decree against the 1st defendant was obtained. The plaintiff was a minor at the date of the sale, and, within three years of his attaining majority, he instituted the suit out of which the appeal arose for a declaration that the money decree obtained against the 1st defendant and the proceedings in execution thereof were not binding upon him, and that his share of items 1 to 4 did not pass to the 3rd defendant under the Court-sale and for possession and incidental reliefs.

Held, affirming the Court below, that the plaintiff could not get possession without getting the Court-sale set aside, that Art. 12 of the Limitation Act therefore applied to the case, and that the suit was barred.

The plaintiff abovenamed also prayed for the recovery of his share of item 5, another item of joint family property which was sold by the 1st defendant by a registered sale-deed.

Held, also affirming the Court below, that, as the suit was brought within three years of the plaintiff attaining majority, it was not barred by limitation, although the elder son, the 2nd defendant, had attained his majority more than three years earlier and had taken no steps to question the alienation.

Second Appeal against the decree of the District Court of Coimbatore in A. S. No. 70 of 1923 preferred against the decree of the Court of the Second Additional Subordinate Judge of Coimbatore in O. S. No. 122 of 1922 (O. S. No. 227 of 1921 on the file of the Principal Sub-Court, Coimbatore).

Watrap S. Subramania Aiyar for appellant.

M. Krishna Bharati and *C. S. Swaminathan* for respondents.

The Court delivered the following

Devadoss, J.

JUDGMENT :—*Devadoss, J.* :—The plaintiff's suit is for a declaration that the decree and execution proceedings in O. S. No. 32 of 1907 are not binding upon him and that his

*S A No. 1191 of 1924. 2nd September, 1926.

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share of the family property did not pass to the vendee under the Court-sale and for possession and incidental reliefs. The Subordinate Judge dismissed the suit as being barred by limitation. On appeal the District Judge of Coimbatore held that the plaintiff's suit was barred under Art. 12 of the Limitation Act as regards items 1 to 4, and that the suit was not barred in respect of item No. 5, and remanded the suit for trial of the issues relating to item No. 5. The plaintiff has preferred this second appeal.

The facts are, the plaintiff and the 2nd defendant are the sons of the 1st defendant. Items 1 to 4 were sold in execution of a money decree obtained against the 1st defendant in O. S. No. 327 of 1907 and were purchased by the 3rd defendant who took delivery of them in August, 1908. The 5th item was sold by the 1st defendant to one Rangaswami Naicken by a registered sale-deed dated 2nd April, 1907 and defendants 8 to 10 who purchased it from Rangaswami Naicken have been in possession from 21st June, 1909. Neither the plaintiff nor the 2nd defendant were parties to O. S. No. 327 of 1907. The plaintiff attained majority recently and has brought this suit within 3 years after attaining majority. The question is whether his suit is barred by limitation. So far as item 5 is concerned the suit is not barred by limitation as it has been brought within 3 years of the plaintiff attaining majority It has been recently held in *Jawahir Singh* v. *Udai Parkash* (1) that a suit brought by the son within three years of his attaining majority to avoid the sale effected by his father is not barred by limitation although the elder son attained his majority more than three years earlier and had taken no steps to question the alienation.

The question in this appeal is what is the article of the Limitation Act applicable to a suit brought by the son after attaining majority for setting aside the sale of his share in Court-auction in execution of a decree against the father.

It is well settled that a father can sell the family property including the share of his sons for an antecedant debt and the sons can challenge the alienation by a suit on the ground that the debt was incurred by the father for immoral or illegal purposes. If they do not challenge the alienation by a suit or if they fail to establish that the debt of the father was incurred for illegal or immoral purposes, the sale would be good to the extent of their shares as well. It is also well settled that a

1. (1925) I L R 48 A 152: 50 M L J 344 (P C).

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person who obtains a money decree against him can bring the family property to sale without impleading the sons, and the auction-purchaser would get a good title to the property sold including the shares of the sons who are not parties to the decree. It is open to the sons to have the sale set aside on the ground that the debt for which their shares were sold was incurred by the father for illegal or immoral purposes; but so long as they do not challenge the sale by a suit, or if they bring a suit and fail, the auction-purchaser would get a good title to the property purchased by him. Vide *Brij Narain* v. *Mangal Prasad* (2), *Nanomi Babuasin* v. *Modhun Mohun* (3) and *Sripat Singh Dugar* v. *Prodyot Kumar Tagore* (4).

If the auction-purchaser buys the shares of the sons in execution of the decree against the father, can they claim their shares without setting aside the sale? If the alienation is void, no doubt, the sons need not sue to set aside the sale but the sale is not void but is only voidable at the suit of the sons. So long as it is not avoided, the sale would hold good. That being so, the sons are bound to set aside the sale if they want to recover their share of the family property. Art. 12 begins as follows:—

"To set aside any of the following sales: (*a*) sale in execution of the decree of a Civil Court."

If a sale in execution of a decree by a Civil Court is to be set aside, a suit will have to be brought within one year of its confirmation or of its becoming final and conclusive. It is urged for the appellants that if the son shows that the debt was incurred for illegal or immoral purposes the Court would hold that the son's share is not bound and, therefore, the proper article of Limitation Act applicable to the case would not be Art. 12. When we have to apply the Law of Limitation we must look at the pleadings and not at the result of the suit. Could the plaintiff get back his share of the property without setting aside the sale? The case would be different if the sale was void in which case the plaintiff need not pray for setting it aside. But as I have already observed the sale is not void. It can only be avoided on the proof of certain facts by the plaintiff and only so far as his share is concerned. The case in *Bijoy Gopal Mukerji* v. *Krishna Mahishi Debi* (5) has no application to the present. It was

2. (1923) I L R 46 A 95: 46 M L J 33 (P C).
3. (1885) I L R 13 C 21: L R 13 I A 1 (P C).
4. (1916) I L R 44 C 524: 32 M L J 133 (P C).
5. (1907) I L R 34 C 329: 17 M L J 154 (P C).

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held in that case that a reversioner could sue for possession of the property sold by a Hindu widow within twelve years of her death. The alienation of a widow stands on a different footing from the sale by a Hindu father. The widow can give a good title if the consideration for the sale be for any of the purposes which would bind the reversioners and so long as she is alive, the reversioners are not bound to sue to set aside the alienation ; but the moment the widow dies the reversion opens and the nearest reversioner is entitled to sue for possession of the property and need not seek to set aside the alienation which is not binding on him. The reversioner is not affected by anything that the widow may do during her lifetime ; if her alienation is such as would bind the reversion it cannot be impeached ; if it is not, the reversioner need not sue to have it set aside. The reversioner has not a present interest in the property in the possession of the widow. It is only after the widow's death that the nearest reversioner would be entitled to the property. The auction-sale of family property covers not only the father's share but the son's share as well and unless the son challenges the sale within the period allowed by law, the sale would become unassailable.

In considering what article of the Limitation Act should be applicable to cases of this kind, the Court should have regard to the observations of their Lordships of the Privy Council in *Malkarjun* v. *Narhari* (6) :

> "The Limitation Act protects *bona fide* purchasers at judicial sales by providing a short limit of time within which suits may be brought to set them aside. If the protection is to be confined to suits which seek no other relief than a declaration that the sale ought to be set aside and is to vanish directly some other relief consequential on the annulment of the sale is sought, the protection is exceedingly small.... What is the justification for refusing to construe Art. 12 (*a*) according to its obvious meaning whenever a suitor goes on to pray for that relief which is the object, perhaps the only object, of setting aside the sale? Their Lordships hold that both the letter and the spirit of the Limitation Act require that this suit, when looked on as a suit to set aside the sale, should fall within the prohibition of the article."

In *Bhola Jha* v. *Lala Kali Prasad* (7) it was held that the period of limitation was one year under Art. 12 of the Limitation Act for a suit for the redemption of the son's share of the family property sold in execution of a mortgage decree against their father. Roe, J. observes that

> "if a suit to redeem is maintainable, the first step necessary for redemption is a declaration that the sale should be set aside."

6. (1900) I L R 25 B 337: 10 M L J 368 (P C).
7. (1916) 1 Pat L J 180.

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The plaintiff cannot get possession without getting the sale set aside and the article applicable to the case is Art. 12. In this view, the judgment of the learned District Judge is right; the second appeal fails and is dismissed with costs.

A. S. V. *Appeal dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE ODGERS AND MR. JUSTICE MADHAVAN NAIR.

K. Senga Naicken and another ... *Appellants** (*Plffs.*)

v.

The Secretary of State for India in Council represented by the District Collector of Salem ... *Respondent* (*Defendant*).

Senga Naicken v. Secretary of State for India.

Land Acquisition Act, S. 6 (1)—Proviso—Compensation to be paid wholly or partly out of public revenue—Payment of one anna by Government towards compensation if sufficient to comply with provision as to—Validity of declaration in such a case—Proceedings for acquisition taken bona fide*—Effect.*

The plaintiffs were the owners of the suit property which was acquired for the purpose of forming a road by a Government notification. The cost of the road was defrayed by private contributions and the Government added the sum of one anna for public revenue. The private contributions were accepted as such by the Government and kept as separate deposit for the purpose of constructing the road. They could not therefore be said to be public funds as they were never merged in the general funds of the public. There was no evidence that the acquisition had been brought about by any indirect motive or that the Land Acquisition Act had been set in motion in order to annoy the owners.

Held, that the contribution of one anna by the Government towards the compensation to be awarded for the property was sufficient to satisfy the proviso in S. 6 (1) of the Land Acquisition Act, and that the declaration made under S. 6 (1) of the Act was valid. *Ponnia* v. *Secretary of State,* (1926) 51 M L J 558 dissented from.

Per Madhavan Nair, J.—If the Legislature intended that a substantial portion of the compensation should be paid out of the public revenue, then it would have used appropriate language to convey that idea.

Second appeal against the decree of the District Court of Salem in A. S. No. 135 of 1921 preferred against the decree of the Court of the Principal District Munsif of Salem in O. S. No. 2 of 1920.

The Advocate-General and *K. Ramanath Shenai* for appellants.

The Government Pleader for respondent.

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*S A No. 1755 of 1922. 16th September, 1926.

Senga Naicken v. Secretary of State for India.

The Court delivered the following

JUDGMENT :—A similar question was under discussion in *Ponnia* v. *Secretary of State* (1) before Spencer and Ramesam, JJ., and we feel that it is inexpedient that the question should be decided by us before we have had an opportunity of seeing the judgment which will shortly be delivered by the other Bench. We feel that it is also important to find out exactly how this sum of Rs. 926-7-6 was deposited by the ryots in this case—was it deposited for the specific purpose of constructing this road and was it accepted as such or was there simply a credit to the general revenues of the amount ? The form of the receipt granted to the ryots may be material and the way in which the money has been credited in the books of the Government Officers. There will be a finding called for on the nature and terms of the deposit made by the ryots in this case and the District Judge will kindly deal with any evidence either already on record or additional as the parties may produce on this point. The finding will be submitted within six weeks and ten days will be allowed for finding objections.

In pursuance of the order of this Court, dated 8th September, 1925, calling for a finding upon the issue referred to by this Court for trial, the District Judge of Salem submitted the finding.—*See* judgment.

After the return of the finding the Court delivered the following

Odgers, J.

JUDGMENTS :—*Odgers, J.* :—This was a suit by two inhabitants of Thidavoor, Athur Taluq, Salem District, against the Secretary of State for a declaration that certain notifications and subsequent proceedings taken by the Government Officials under the Land Acquisition Act are illegal and *ultra vires*. The plaintiffs are the owners of the property in question which was acquired for the purpose of forming a road by a Government notification, dated 14th September, 1918. The learned District Munsif dismissed the suit. On appeal to the learned Judge the same result was reached. It appears that the cost of the road was defrayed by private contributions and that the Government added the sum of one anna for public revenue. When the second appeal first came on before Mr. Justice Viswanatha Sastri and myself, we found that a similar discussion as to whether the provisions of S. 6, cl. (1)

1. (1926) 51 M L J 338.

Senga Naicken v. Secretary of State for India.

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had been complied with was under discussion in *Ponnia* v. *Secretary of State* (1) before Spencer and Ramesam, JJ. We therefore deferred our decision on the question but sent the case down for a finding as to how the contributions were deposited by the ryots in order that we might discover whether that money could be fairly termed public revenue or not. The learned District Judge, now Mr. Justice Wallace, in the Lower Appellate Court held that the compensation awarded was at the time of the award "public revenue" and that as soon as the public agency has applied the private funds for public purposes private ownership in these funds ceases and they become public revenues. The finding called for has now returned and it is to the effect that the contributions were accepted as such by the Government and kept as separate deposit for the purpose of constructing the road. It therefore seems to me that the contributions cannot be said to be public funds as they were never merged in the general funds of the public.

However, that does not decide the matter. It is admitted that the Government contributed one anna to the cost and the question is whether this satisfies the requirement that the compensation was paid wholly or partly out of public revenues (*see* Ex. II). We have now the advantage of the judgment of Spencer and Ramesam, JJ., and they held that the condition in the section is not satisfied by the payment of one anna. The question is, can this decision be accepted by us? The learned Judges seem to apprehend that if a small contribution were deemed to satisfy the section that it may be a mere devise for private persons to employ the Act for private ends or for the gratification of private spite or malice. I think it fair to assume that the Government by whom the acquisition has to be made would not knowingly or willingly lend itself to any such acquisition or employment of the Act and in this particular case the Collector of Salem in his proceedings dated 12th July, 1916, Ex. A, found there was no objection to the construction of a road through this land provided the people concerned contributed the cost. Now the learned Judges in the case referred to held that the words "partly out of public revenues" were not satisfied by the contribution of a particle, for which they relied on the case of *Chatterton* v. *Cave* (2). This case will have to be examined in some detail as the whole of the *ratio decidendi* of the learned Judges appear to rest on this and possibly on one other case which they cite at the end of

1. (1926) 51 M L J 338. 2. (1878) 3 A C 483.

Senga Naicken v. Secretary of State for India.

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their final judgment after a finding had been returned, namely *Luchmeswar Singh* v. *Chairman, Darbangha Municipality* (3). *Chatterton* v. *Cave* (2) was a case of infringement of copyright where two plays had been separately adapted from a common source by the parties to the litigation. The matter was left to the Lord Chief Justice, Coleridge, and he found that the extent to which the one was taken from the other was so slight and the effect on the total composition was so small that there was no substantial and material taking of any one portion of the defendant's drama from any portion of the plaintiff's. It is there that the distinction between 'part' and 'particle' is made. Lord O'Hagan at page 497 says :—

"No doubt, any scene or point or incident or line or word in a drama is a part of it; and no doubt it is the duty of a Court of construction to carry out the plain intentions of the Legislature strictly, even though it may not approve of them as sound in principle or wise in policy or just in operation. But we should scrutinise carefully the terms of a statute before we lend ourselves to administer it with ill results and see whether it forces us inevitably to produce them."

He then goes on to apply the same construction to the statute giving copyright in dramatic productions as those which afford protection to copyright in books and to hold that to render a writer liable for literary piracy he must be shown to have taken a material portion of the publication of another. He observes that

"the question in every case must be one of fact: 'part' is not necessarily the same as 'particle' and there may be a taking so minute in its extent and so trifling in its nature as not to incur the statutable liability."

With great respect I gravely doubt whether the analogy of a question of copyright can be applied to a matter under the Land Acquisition Act. I invited the learned Advocate-General for the appellants to say where a 'particle' would end and 'part' begin of this sum of Rs. 600. It is true an anna is a very small part of Rs. 600. But nevertheless it is a part. It is not to be forgotten that their Lordships in the case considered above were not dealing with an original subject at all. Admittedly both of the litigants had derived their compositions from a common source and it stands to reason that before you can compel a man to pay damages for stealing the product of your brain, time and labour you must be able to point out that any resemblance between his production and yours is not merely accidental but is a designed

2. (1878) 3 A C 483. 3. (1890) I L R 18 C 99 (P C).

theft of the product of your brain. Otherwise as their Lordships point out one might go to the absurdity of objecting to a man using the same words though in a different collocation as you have done. As their Lordships say it is a question of fact as to how much similarity will establish the fact of this theft. It seems to me that this case has no resemblance to the question of money whether any amount, however small, is a definite proportion of the whole.

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The other case in *Luchmeswar Singh* v. *Chairman, Darbangha Municipality* (3), involves the question of the power of a guardian. There a guardian acting in a dual capacity as guardian of the minor Maharaja and Chairman of the Municipality gave up a part of his ward's property to the Municipality for the nominal compensation of Rupee One. It was held that no valid title to the land was established against the ward, as the guardian did not act in the interests of the minor. That case in my opinion has nothing whatever to do with the present. Had there been evidence that this acquisition had been brought about by any indirect motive or that the Act had been set in motion in order to annoy the owner, one would have felt very loath to say that the acquisition was right and proper. But the Collector seems to have considered the matter carefully and there is no evidence before us of any improper motive on the part of those who desired that the path should be made. It cannot of course be argued that the land was not acquired for a necessary purpose because that once the notification has been made it is to be presumed that the purpose is necessary.

There is one other consideration which I think operates in favour of the view I have taken. Suppose on appeal the compensation had been enhanced. There is no doubt that the Government would have to defray the extra sum out of the public revenues and having once undertaken the acquisition they could not call on the constituents again.

For all these considerations I am therefore of opinion that with respect the decision in *Ponnia* v. *Secretary of State* (1) cannot be followed. I would therefore hold that the contribution of one anna does satisfy the proviso in S. 6, cl. (1) of the Land Acquisition Act. In the result the second appeal fails and must be dismissed with costs.

Madhavan Nair, J.

Madhavan Nair, J.—I have had the advantage of reading my learned brother's judgment with which I agree.

1. (1926) 51 M L J 338. 3. (1890) I L R 18 C 99 (P C).

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The facts of the case need not be re-stated. S. 6, cl. (1) of the Land Acquisition Act provides that "when it appears to the Local Government that any particular land is needed for a public purpose, a declaration shall be made to that effect by a prescribed officer of the Government. This clause is subject to the proviso that

"No such declaration shall be made unless the compensation to be awarded for such property is to be paid.... . .wholly or partly out of public revenues or some fund controlled or managed by a local authority."

In this case we are concerned with the question as to how far a declaration is valid if the Government contributes towards the payment of compensation for a piece of land acquired under the Act only one anna out of the public revenue, the remainder being paid by private contributions; in other words, can it be said that, in such circumstances, compensation has been paid partly out of the public revenue within the meaning of the proviso and consequently the declaration made under S. 6, cl. (1) is valid?

It is argued for the appellants that in order to constitute a payment—payment partly out of public revenue—part of the compensation paid from the public revenue must be a substantial sum and not merely such a small sum as one anna; on the other hand, it is contended for the Government that the requirement of the proviso that the compensation is to be paid partly out of public revenue is complied with if some part of the compensation, however small it may be, is paid out of the public funds.

The appellants' argument is supported by the decision of Spencer and Ramesam, JJ., in *Ponnia* v. *Secretary of State* (1) in which the learned Judges held that the requirements of the proviso above referred to was not satisfied by the contribution of a 'particle', viz., one anna as in the present case. With due deference I am not able to agree with this view. In the course of the judgments reference is made to two cases, namely, *Chatterton* v. *Cave* (2) and *Luchmeswar Singh* v. *Chairman, Darbangha Municipality* (3), in support of their conclusion. For the reasons given by my learned brother I agree with him in thinking that the decision in *Chatterton* v. *Cave* (2) which, dealing with the question of the infringement of copyright, held that there cannot be a violation of 3 & 4 Will. IV, c. 15, S. 2, where the matter or thing taken from the first work and introduced into the second is not material and substantial, cannot

1. (1926) 51 M L J 338. 2. (1878) 3 A C 483.
3. (1890) I L R 18 C 99 (P C).

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afford any guidance in solving the present question, as the considerations involved in the two cases are totally different. The decision in *Luchmeswar Singh* v. *Chairman, Darbangha Municipality*.(3) is also not of much use. In that case the guardian of the estate of a minor Maharaja who was also the Chairman of the Municipality made over a part of the minor's property to the Municipality for the compensation of the nominal sum of one rupee. At the instance of the Maharaja the Privy Council set aside the acquisition of the land mainly on the ground that the procedure set forth in the Land Acquisition Act was not complied with in acquiring the land. After referring to Ss. 11 and 13 of the Act their Lordships of the Privy Council observe as follows :—

"On a day fixed, the Collector, who, after the declaration, is by S. 7 to take order for the acquisition of the land, is to proceed to inquire summarily into the value of the land, and to determine the amount of compensation which, in his opinion, should be allowed for it, and to tender such amount to the persons interested. And in determining the amount of compensation, he is ordered to take into consideration the matters mentioned in S. 24, one of which is the market value, at the time of awarding compensation, of the land. It is obvious that the offer of one rupee compensation was not in accordance with the duty of the Collector under these sections, and it would be altogether wrong to treat one rupee as the amount of compensation determined under S. 13. S. 14 says that if the Collector and the persons interested agree as to the amount of compensation to be allowed, the Collector shall make an award under his hand for the same. This was never done."

Later on, the ground for declaring the acquisition invalid is more pointedly stated by their Lordships in this way:

"Although the Court of Wards had not power to alienate the land for the purpose for which it was required, possession might have been lawfully taken of it if the provisions of the Land Acquisition Act had been complied with. But they were not. The Collector made no inquiry into the value of the land. He was the Chairman of the Municipality, and his sole object appears to have been to benefit the town, forgetting that, as the representative of the Court of Wards, it was his duty to protect the interests of the minor, and to see that the provisions of the Act were complied with."

These extracts make it abundantly clear that the acquisition in that case was set aside not on the ground that the compensation paid was only one rupee but that in determining the amount of compensation the provisions of the Act were not complied with. The learned Judges (Spencer and Ramesam, JJ.) seem to be of the opinion that if the words of the statute are not construed in the way they suggest, then,

"the owners should be deprived of their ownership by a mere device of private persons employing the Act for private ends or for the gratification of private spite or malice."

3. (1890) I L R 18 C 99 (P C).

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I do not think that this result would follow. It may be assumed that the Government will not improperly employ the Act to enable an individual to satisfy his private ends. In this case there is no evidence that the Collector has been prompted to make the acquisition by any indirect motive. The evidence shows that the Collector considered the matter carefully and found that there was no objection to the acquisition of the land in question provided the people concerned contributed the cost.

The consideration pointed out by my learned brother that if on appeal the compensation is enhanced the Government would have to defray the extra amount from out of the public revenue is also in favour of the view that we are taking in this case.

It is true that one anna is a small part of Rs. 600; still it cannot be denied that it is part of that amount. If one anna is not to be considered as a part of the amount for the purposes of this proviso, then how are we to find what portion of it will form a part of it to satisfy the meaning of the words in question in the proviso? If the Legislature intended that a *substantial* portion of the compensation should be paid out of the public revenue, then it would have used appropriate language to convey that idea.

For the above reasons I agree with my learned brother that the contribution of one anna out of the public revenue for the payment of the compensation satisfied the proviso in S. 6, cl. (1) of the Land Acquisition Act.

The Second Appeal must therefore be dismissed with costs.

A. S. V. *Appeal dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—MR. JUSTICE RAMESAM AND MR. JUSTICE REILLY.

Swaminatha Odayar ... *Appellant** (*Deft.*)

v.

Subbarama Aiyar and another ... *Respondents* (*Plaintiffs*).

Swaminatha Odayar v. Subbarama Aiyar.

Transfer of Property Act, S. 55 (4)—Vendor's lien—Extinguishment—"Contract to the contrary"—Promissory note for purchase-money executed by vendee in favour of third party at vendor's instance—Effect—Payee benamidar for vendor—Effect—Limitation Act, S. 19—Promissory note—Acknowledgment

*Appeal No. 169 of 1924. 8th September, 1926.

of liability under—Deposition—Admission in, of execution of note without denial of subsisting liability under it—Effect—Promissory note—Suit on—Right of real owner alleging payee to be benamidar for himself.

Swaminatha Odayar *v.* Subbarama Aiyar.

When the vendee at the instance of the vendor executes a promissory note for the purchase money or a part of it in favour of a third party, there is, in respect of the whole or part of the purchase money covered by such note, a "contract to the contrary" within the meaning of S. 55 of the Transfer of Property Act and the vendor's statutory charge on the property is so far defeated. The position is the same so far as the vendee is concerned whether the third party is a benamidar for the vendor or not, unless it is shown that the vendee was aware that the third party was only a benamidar for the vendor and knowingly dealt with the vendor under the benamidar's name, in which case there would be no "contract to the contrary" within the meaning of S. 55 of the Act.

Semble.—When once there is a "contract to the contrary" within the meaning of S. 55 and the vendor's charge is so defeated, the statutory charge cannot be revived. If, therefore, the vendor takes a promissory note executed by the vendee in favour of a third party for the purchase money or part of it but afterwards fails to hand it over to the payee, so far as the vendee is concerned, "the contract to the contrary" has been made, and it cannot be rescinded by the vendor.

In a suit upon a promissory note instituted more than four years after the date of its execution the question was whether the suit was saved from the bar of limitation by an acknowledgment made by the defendant (the maker) in his deposition in a prior suit, which contained a statement that he executed the note without any denial that the liability under the note was then subsisting.

Held, in the circumstances of the case, that the defendant's statement in his deposition that he executed the promissory note coupled with his failure to mention any payment towards the discharge of it was an implied admission that the liability under the note was then subsisting, and that the statement was an acknowledgment within the meaning of S. 19 of the Limitation Act, which saved the suit on the note from being time-barred.

Per Ramesam, J.—A person whose name does not appear in a promissory note cannot sue on it alleging that the payee was a benamidar for himself.

An acknowledgment in a deposition need not be express and may be a matter of inference. It can be implied from the facts and the surrounding circumstances and not implied as a matter of law.

Appeal against the decree of the Court of the Subordinate Judge of Kumbakonam in O. S. No. 15 of 1922.

S. Varadachariar and *R. Rajagopala Aiyangar* for appellant.

T. M. Krishnaswami Aiyar and *K. Narasimha Aiyangar* for respondents.

The Court delivered the following

JUDGMENTS :—*Ramesam, J.* :—The facts out of which this appeal arises are in the main undisputed and may be shortly stated. The 1st plaintiff obtained some lands under a will. On 16th August, 1917 he entered into an agreement to sell the

Ramesam, J.

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said lands to the defendant for Rs. 15,250 and on that day obtained a cash advance of Rs.1,250 towards the consideration. On the 24th August a further sum of Rs.220 was paid towards the consideration. On the 5th September, 1917 a sale deed was executed, a further sum of Rs. 1,780 being paid in cash. There remained an amount of Rs. 12,000 due towards the consideration. The sale deed provided that Rs. 6,000 was to be paid before the Sub-Registrar and the other Rs. 6,000 was to be paid to the 1st plaintiff's mother Sitalakshmi Ammal, who is the 2nd plaintiff. Accordingly on the same day the defendant executed a promissory note for Rs. 6,000 in favour of the 2nd plaintiff. Soon after the 1st plaintiff refused to register the sale deed contending that it was nominal. The defendant obtained compulsory registration of the sale deed. But the Rs. 6,000 was not paid before the Sub-Registrar. The defendant then filed a suit O. S. No. 269 of 1919 in the Court of the District Munsif of Valangiman for possession of the lands sold. The 1st plaintiff who was the only defendant in that suit contended that the sale deed was a nominal transaction. The District Munsif dismissed the suit. On appeal by the plaintiff therein (the present defendant) the Subordinate Judge of Kumbakonam decreed the suit. He also passed a decree for the payment of Rs. 6,000 which was originally intended to be paid before the Sub-Registrar, to the defendant therein (the present 1st plaintiff). This was on 21st January, 1921. There was a second appeal to the High Court which was dismissed on the merits of that suit. One of the grounds in second appeal was that the learned Judge ought to have recorded a distinct finding in regard to the six thousand rupees promissory note and made provision for its payment also. On this ground the learned Judges who disposed of the second appeal said:—

> "As regards the sum of Rs. 6,000 payable to the defendant's mother it is admitted a promissory note has been executed and that a suit is pending. There is no necessity to provide for payment to her in this suit especially as she is not a party."

In the interval between the disposal of the appeal by the Subordinate Judge and the disposal of the second appeal the present suit was filed on 11th February, 1922 to recover the sum due on the promissory note (Ex. B). It is alleged in the plaint that the 2nd plaintiff was not a party to the contract, that the promissory note was executed by the defendant in the name of the 2nd plaintiff but really for the benefit of the 1st plaintiff. It is also alleged that the promissory note was

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not delivered to the 1st plaintiff at the date of the execution, that the note was kept with one Nataraja Pillai as an intermediary and that it was obtained from Nataraja Pillai long after the appeal judgment of the Subordinate Judge in the former suit. This last allegation is denied by the defendant. The Subordinate Judge said nothing on this point. He found that the 2nd plaintiff is a mere benamidar for the 1st plaintiff, that the suit was not barred and decreed the suit. He also found that the plaintiff is entitled to the vendor's lien for unpaid purchase money and gave a decree for sale. The defendant appeals. It may be observed at the outset that the burden of proving that the promissory note was not delivered on the date of the execution is on the plaintiffs. No attempt has been made to prove the allegation and I think it must be found that the promissory note was delivered to the 1st plaintiff on the date of the execution and that the story about its being kept with Nataraja Pillai is a myth.

One point argued by the appellant is, that as a result of the former litigation it must be taken as having been impliedly decided in it that the 2nd plaintiff was the person entitled to the beneficial interest in Ex. B. I do not think so. Any question relating to the note arose for the first time only after the Subordinate Judge found that the sale deed was not nominal. We do not know what happened before the Subordinate Judge at the time of delivering the judgment in that suit. The High Court merely abstained from expressing any opinion on this matter for the reason that a separate suit had been filed and that the present 2nd plaintiff was not a party to that litigation. It cannot be said that any conclusion is necessarily implied in the course taken by the learned Judges.

The next important point argued by the appellant is, that the 2nd plaintiff is the only person competent to sue on Ex. B, and therefore the vendor's lien was extinguished. On the other hand, it is contended for the respondents that there is nothing to show that the 2nd plaintiff ever accepted the note and therefore the right to the balance of the purchase money remained with the 1st plaintiff and with it the vendor's lien. It is admitted by the defendant in his former deposition now filed as Ex. E, that the 2nd plaintiff was not present when Ex. A was executed. Until therefore the 2nd plaintiff accepts the note the note has not become operative. Seeing that the defendant has performed what was required of him by the 1st plaintiff at the time of the transaction one would expect that, if the 2nd plaintiff refused to accept the note, the 1st plaintiff

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would have communicated such a fact within a reasonable time to the defendant and demanded the balance of the purchase money as on a failure of consideration. It is doubtful whether in such a case, the vendor's lien was at first extinguished, and if so, would revive. But it is unnecessary to express any opinion on that matter. No such notice was given by the 1st plaintiff and he behaved throughout as if he was content that the right in the note should remain in the 2nd plaintiff. It is really unnecessary to consider whether the 1st plaintiff was the person beneficially interested in the note. Probably, he was and is, though, at the same time, it must be remarked that no formal evidence has been adduced by the plaintiffs on the matter as they ought to have done. But whoever the person entitled to the beneficial interest may be, the only person that is entitled to sue on it is the 2nd plaintiff, though it may be that after the money was recovered she would have to pay it to the 1st plaintiff. It was held in *Reoti Lal* v. *Manna Kunwar* (1) that a person whose name does not appear in the promissory note cannot sue on it alleging that the payee was a benamidar for himself. [See also *Subramania Thevan* v. *Arunachala Thevan* (2)]. Mr. T. M. Krishnaswami Aiyar appearing for the respondents contended that the note itself not having been delivered to the payee who was not present at the time was a void note. I cannot agree with this contention. The 1st plaintiff purported to act as agent of the 2nd plaintiff in taking the note and it was open to the 2nd plaintiff to ratify his act, though until it is so ratified the 2nd plaintiff does not step into the transaction. In the present case, the 2nd plaintiff is willing to have a decree in her favour if the Court finds that the 1st plaintiff is not entitled to sue. This ratification is good enough. I must therefore hold that the 2nd plaintiff is the only person entitled to sue on Ex. B. The question that arises on this finding is, whether the vendor's lien is lost. The following propositions are undisputed :—

1. A mere direction by the vendor to the vendee to pay the whole or a part of the purchase money to a third person does not extinguish the lien [vide *Sivasubramania Aiyar* v. *Subramania Aiyar* (3)].

2. If such direction is followed by mere payment of the 3rd person but not by a fresh contract by the vendee with the 3rd person so as to effect a complete novation, the lien is not lost [vide *Theyagaraja Mudaliar* v. *Seshappier* (4)].

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1. (1922) I L R 44 A 290.
2. (1907) 18 M L J 186
3. (1916) I L R 39 M 997; 31 M L J 530 (F B).
4. (1919) 10 L W 518.

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3. Where it was intended that the vendee should execute a mortgage deed and extinguish the lien but the mortgage deed was not completed by registration and remained a simple bond, the lien is not extinguished [vide *Ranganayaki Ammal* v. *Parthasarathi Aiyangar* (5)].

4. Where the vendor obtained a promissory note not from the vendee but from a third person at the instance of the vendee and the third person did not pay, even then, if the third person's note or bond was only an additional security to the vendee's liability and not in substitution of it, the lien is not lost [cf. *Balagurumoorthi* v. *Nagulu* (6)].

5. Where the vendor himself takes a promissory note or bond and where the right in it was assigned by him to a third person or where his right was attached in execution of a decree and purchased by a third person [vide *Sambasiva Aiyar* v. *Venkatarama Aiyar* (7)] the vendor's right to the lien passes to the third person under S. 8 of the Transfer of Property Act and is available to the assignee or purchaser.

But if in this last case the vendor took a negotiable instrument and the instrument is not assigned but endorsed under the Law Merchant it is doubtful if S. 8 of the Transfer of Property Act will apply and the endorsee will be entitled to the lien. It is unnecessary to express an opinion on that matter now.

But where a complete novation is effected and a new contract between the vendee and a third person was effected in substitution of the vendee's liability to the vendor this amounts to a contract to the contrary within the meaning of S. 55 of the Transfer of Property Act and the lien is extinguished. I am willing to concede that even in such a case if the document taken is not a negotiable instrument but only a bond and if it is taken benami for the benefit of the vendor so that he may still sue on it the arrangement being known to the vendee and the vendor's lien remains provided he is not prejudiced. But where the document taken is a negotiable promissory note so as to disable the vendor from suing even if he is the person beneficially interested in the money after its recovery the lien must be held to be lost as ostensibly the payee of the note is the only person entitled to sue. The note might have been endorsed not to the vendor but to any third person. To say that the note in the hands of the payee has got the lien attached to it involves anomalous positions. Anyhow, there is nothing to show

5. (1919) 10 L W 550. 6. (1921) 14 L W 191. 7 (1926) M W N 569.

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that the vendee knew the benami nature of the note. I therefore hold that the 2nd plaintiff is not entitled to the vendor's lien in this case.

As the suit was filed more than four years after the execution of Ex. A the question next arises whether the suit is barred by limitation. The plaintiffs rely upon the defendant's deposition, Ex. E, as an acknowledgment to save limitation. The material passage in the deposition runs thus:—

"I was directed to pay Rs. 6,000 to defendant's mother Seethalakshmi Ammal in Ex. B. I executed a pro-note in her favour on the date of Ex. B immediately after Ex. B was written and delivered the said pro-note to Subbarama Aiyar. I owed Rs. 6,000 more under Ex. B."

* * * * * *

"Defendant did not tell me why he wanted me to pay Rs. 6,000 to his mother I have not received any notice from defendant's mother about the pro-note I executed in her favour. I did not enquire if the pro-note I executed to defendant's mother for Rs. 6,000 did or did not reach her. She was not present when I executed the note and delivered it to defendant."

The appellant contends that this does not amount to an acknowledgment. A case decided by Miller, J., and reported in *Ranganayakulu Aiya* v. *Subbayan* (8) was relied on for the respondents' contention that this deposition amounts to an acknowledgment. This decision of Miller, J., has been adversely commented on in various later decisions. In *Subbarama Aiyar* v. *Veerabhadra Pillai* (9) Napier, J., observed:—

"It may not necessarily always be that deduction to be drawn."

In *Kandasami Reddi* v. *Suppammal* (10) Ayling, J., after quoting the last sentence of Napier, J., referred to *Andiappa Chetty* v. *Alasinga Naidu* (11)—

"Each case must be treated on its own merits"

and then said:—

"From the language used and the circumstances in which the acknowledgment is made, it must be decided whether it amounts to an implied acknowledgment of subsisting liability."

Earlier in the judgment he observed after citing the decision of the Privy Council in *Maniram Seth* v. *Seth Rupchand* (12)—

"I can see no ground whatever for holding that their Lordships were considering anything but the circumstances of that case or intended to lay down any rule of legal inference."

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8. (1908) 5 M L T 71.
9. (1921) 41 M L J 217.
10. (1921) I L R 45 M 443: 42 M L J 268
11. (1911) I L R 36 M 68: 21 M L J 1024
12. (1906) I L R 33 C 1047: 16 M L J 300 (P C).

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Mr. Rajagopala Aiyangar in replying for the appellant contended that the acknowledgment in a deposition must be expressed and not implied. He relied on *Venkata* v. *Parthasaradhi* (13). But the authorities cited in this decision in *Venkata* v. *Parthasaradhi* (13) in the language of Ayling, J., already cited and the decision in *Maniram Seth* v. *Seth Rupchand* (12) show that it need not be express and may be a matter of inference. It can be implied from the facts and the surrounding circumstances and not implied as a matter of law as Miller, J., seemed to have thought. This is also the view of Schwabe, C. J., and Krishnan, J., in *The Official Assignee of Madras* v. *Subramania Aiyar* (14).

When we look at the circumstances of this case, we find that the defendant when he was examined as his 1st witness in the former suit was anxious to show that the sale deed was not nominal and that some consideration was paid for it. If any payment was made towards the promissory note he would have stated it. If no payment was made, his position in that case was one of willingness to pay the amount due on the note and the amount to be paid before the Sub-Registrar. The whole tenor of the deposition was that while he was willing to perform his side of the contract the vendor would not allow him to do so and prevented him from making further payments by the attitude he took. The deposition clearly implies that the note was real and subsisting and on account of fault of his, no further payments were made towards it, but that he is willing to pay it if the other side was willing to receive it. I think there is an acknowledgment of subsisting liability in this case. This case is stronger than the decision of Schwabe, C. J., and Krishnan, J., above-mentioned, where, an omission in a written statement to deny the allegation in a plaint is all that we have. This case is similar to the decision in *Maniram Seth* v. *Seth Rupchand* (12) where also it was an inference from the circumstances. Mr. Rajagopala Aiyangar relied on the case *Muthukumara Mudaliar* v. *Chockalinga Mudaliar* (15). Neither from the report nor from the printed papers it is clear why the former deposition was made and I do not think that case helps us in deciding the present case.

In the result, I hold that the suit is not barred by limitation. The decree of the Lower Court will be vacated and a personal decree will be passed for the amount sued for in

12. (1906) I L R 33 C 1047: 16 M L J 300 (P C).
13. (1892) I L R 16 M 220: 3 M L J 35.
14. (1923) 46 M L J 1.
15. (1923) 17 L W 674.

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favour of 1st plaintiff, as the 2nd plaintiff consents to such a decree.

The order as to costs in the Court below will stand. In appeal, each party will bear its own costs.

Reilly, J.

Reilly, J. :—So far as this suit is a suit on the promissory note, Ex. B, the learned Subordinate Judge has found that it is not time barred because it is saved by an acknowledgment made by defendant in his deposition, Ex. E, in the previous suit, which contains a statement that he executed the note without any denial that the liability under the note was then subsisting. The Subordinate Judge has relied on *Subbarama Aiyar* v. *Veerabhadra Pillai* (9). One of the reasons for the decision of the learned Judges in that case was a dictum of Miller, J. in *Ranganayakulu Aiya* v. *Subbayan* (8)—

"An acknowledgment of liability existing at a past date without any allegation that the liability has since ceased is presumed to be an acknowledgment of liability when the statement is made."

That Miller, J., stated as the effect of the decision of the Privy Council in *Maniram Seth* v. *Seth Rupchand* (12). With the greatest respect I do not think it can be doubted that Miller, J., read more into the decision in *Maniram Seth's case* (12) than can be found in it and stated his proposition too widely. I entirely agree with Ayling, J.'s interpretation of *Maniram Seth's case* (12) in *Kandasami Reddi* v. *Suppammal* (10) which has been approved in *The Official Assignee of Madras* v. *Subramania Aiyar* (14). In some cases an admission of liability in the past with no denial that the liability continues may imply an admission that the liability continues. Whether there is such an implied admission is a matter of evidence, not of legal presumption. Before deciding the question whether there is such an implied admission we must examine the context of the admission of a liability in the past and the circumstances in which it was made and consider whether the maker of that admission had any need or incentive in the circumstances to deny the continuance of the liability, if he would do so, and whether he had an opportunity of denying it. When the admission of a liability in the past is made in a deposition given in Court we must be particularly careful to consider whether the witness had an opportunity of denying the continuance of the liability, remembering that a witness under examination is not always at liberty to say all that he may wish

8 (1908) 5 M L T 71. 9. (1921) 41 M L J 217.
10. (1921) I L R 45 M 443. 42 M L J 268.
12. (1906) I L R 33 C 1047: 16 M L J 300 (P C)
14. (1923) 46 M L J 1.

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to say of all that he may think it necessary to say in order to protect his own interests but has to answer the questions put to him. With this warning in mind let us examine what defendant said in his deposition in the previous case. The important words appear to me to be

"I was directed to pay Rs 6,000 to defendant's mother, Sitalakshmi Ammal, in Ex. B (the sale deed). I executed a pro-note in her favour on the date of Ex. B immediately after Ex. B was written and delivered the said pro-note to Subbarama Aiyar."

Now in that suit the present defendant was trying to show that the sale was a real transaction, which the present plaintiff 1 denied. Defendant was anxious to show that he had done his part in the matter and was explaining in his deposition all that he had done in making part payments and in other ways. He had just mentioned that he had made three such payments. And he went on after the part of his deposition now in question to explain why he did not pay the remaining Rs. 6,000 of the purchase money, as intended, before the Sub-Registrar. In the circumstances it is clear that it was very much to his interest, when he mentioned this promissory note, to mention also any payment which he had made under it. And it must be noticed that the part of his deposition which I have quoted was made in examination-in-chief. Defendant's vakil, who had just elicited his evidence about part payments made, must have been fully aware that evidence that any payment had been made towards the discharge of the promissory note would strengthen his case, and it cannot be supposed that he would not have given defendant an opportunity of mentioning any such payment. In the circumstances I think it is clear that defendant's statement that he executed the promissory note coupled with his failure to mention any payment towards the discharge of it was an implied admission that the liability under the note was then subsisting. I agree therefore in finding that defendant made an acknowledgment within the meaning of S. 19 of the Limitation Act, which saves the suit on the note from being time-barred.

Curiously enough Mr. Krishnaswami Aiyar for plaintiffs has been at pains to argue before us that the promissory note, Ex. B, though it is in part the basis of plaintiffs' suit, is not valid because it was never delivered to plaintiff 2, the payee named in it. In the plaint it is stated that Ex. B was not delivered to either plaintiff but was left with one Nataraja Pillai. In the defendant's written statement it is alleged that Ex. B was delivered to plaintiff 1 on behalf of plaintiff 2, who is his mother. The only oral evidence on this question is that of

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defendant, whose deposition, Ex. E, in the previous suit was admitted by consent. In that deposition defendant states that he delivered the promissory note to plaintiff 1 immediately after the sale-deed was written. Plaintiff 1 did not go into the witness-box to deny this. Nataraja Pillai was not examined, and it appears that, though he had given evidence in the previous suit, plaintiffs omitted to apply, perhaps advisedly, that his deposition should be admitted as evidence in this suit. On the record as it stands the only reasonable finding is that the promissory note, Ex. B, was delivered by defendant to plaintiff No. 1 on the date of its execution, which is the date of the sale deed. The sale deed, Ex. A, recites that plaintiff No. 1 had directed defendant to pay the Rs. 6,000 which is represented by this promissory note to plaintiff No. 2, his mother. It is admitted that plaintiff No. 2 was not present when the sale deed and the promissory note were executed. In the circumstances it may clearly be inferred that plaintiff No. 1, when he took delivery of the promissory note from defendants, represented himself as his mother's agent in this matter. There is no evidence when plaintiff No. 1 handed the note over to plaintiff No. 2 ; but it must be held to have reached her eventually because she and plaintiff No. 1 jointly have produced it in this suit. And the fact that she has sued on the note shows that she ratified plaintiff No. 1's action in taking delivery of it as her agent. Whether plaintiff No. 2 as payee of the note was only a benamidar for plaintiff No. 1, as now represented by them, or not, the contention that the note is not valid because it was never delivered to the payee fails.

But in spite of the existence of the promissory note, Ex. B, plaintiff No. 1 contends that he is still entitled to enforce his charge under S. 55 (4) (*b*) of the Transfer of Property Act for the part of the purchase money for which Ex. B was executed, and the learned Subordinate Judge has found that he is so entitled. On this part of the case Mr. Krishnaswami Aiyar for plaintiff, as I understand him, has argued alternatively (1) that the promissory note, Ex. B, is invalid and therefore the statutory charge for unpaid purchase money has never been affected by it, (2) that, even if Ex. B is valid, the statutory charge persists concurrently with the liability under Ex. B, and (3) that on plaintiffs giving up their claim under Ex. B, as they are prepared to do, the charge, if it was ever defeated or affected by Ex. B, revives and can be enforced. The first of these contentions has been disposed of by

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the finding that Ex. B is valid. In regard to the second contention it is true that, when the vendor of immoveable property takes a promissory note from the vendee in his own favour for the whole or part of the purchase money or when he directs the vendee to pay the whole or part of the purchase money to a third party, the vendor does not thereby lose the charge for unpaid purchase money given by S. 55 (4) (*b*) of the Transfer of Property Act. In neither of those cases, it will be seen, does the vendee put himself under liability to any one but the vendor. But, when the vendee at the instance of the vendor executes a promissory note for the purchase money or part of it in favour of a third party, the position is altered. The vendee in that case puts himself at the mercy of the third party, even if that party is only a benamidar for the vendor. If in those circumstances the vendor's charge on the property for the amount of the promissory note remained, the vendee would be liable to be sued for the same purchase money by two parties independently. In my opinion there is no doubt that, if by agreement between the vendor and vendee the vendee puts himself under an enforceable liability to a third party for the whole or part of the purchase money, then in respect of the whole purchase money or the part of it, as the case may be, there is a "contract to the contrary" within the meaning of S. 55 of the Act and the vendor's statutory charge on the property is so far defeated. A contract between the vendor and vendee by which a third party obtains the right to exact by suit the purchase money or part of it from the vendee is inconsistent with the vendor retaining a charge to enforce payment to him of the same purchase money. The right to sue for the purchase money cannot reside in one person and the right to enforce the security for its payment in another. The position, in my opinion, is the same so far as the vendee is concerned, whether the third party is a benamidar for the vendor or not, unless it is shown that the vendee was aware that the third party was only a benamidar for the vendor and knowingly dealt with the vendor under the benamidar's name, in which case there would be no "contract to the contrary" within the meaning of S. 55 of the Act. If the third party to whom the vendee puts himself under an enforceable liability for the purchase money is a benamidar for the vendor but the vendee is unaware of that, I do not see how the nature of the document which the vendee executed in favour of the third party, whether it be a bond or a promissory note, can affect the question whether the vendor's charge is extinguished.

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Though the vendor may sue the vendee on a bond of which he is the real obligee but which runs in favour of a benamidar, the benamidar may sue on it in his own name without making the vendor a party and the vendee cannot resist his suit. A contract between the vendor and the vendee by which the vendee makes himself liable to be sued for the purchase money by a third party, whom he does not know to be a mere benamidar for the vendor, or by the assignee of that third party is, in my opinion, essentially inconsistent with the retention by the vendor of his charge to secure the payment of the purchase money even when it may be open to the vendor to prove that the third party is a mere benamidar for him and to sue the vendee on his obligation to the third party. It is the nature of the contract between the vendor and the vendee to which we must look, and that is not affected by the existence of an undisclosed benamidar. In this case it is not pleaded that defendant was aware that plaintiff No. 2 was a benamidar for plaintiff. In regard to Mr. Krishnaswami Aiyar's third contention, when once there is a "contract to the contrary" within the meaning of the section and the vendor's charge is so defeated, I do not see how the statutory charge can be revived. There appears to be no provision in the Act which could have that effect. Nor in my opinion is the position altered if the vendor takes a promissory note executed by the vendee in favour of a third party for the purchase money or part of it but afterwards fails to hand it over to the payee: so far as the vendee is concerned the "contract to the contrary" has been made, and it cannot be rescinded by the vendor. This last point, though mentioned in the argument, does not really arise for decision in the present case as it has been found that the promissory note, Ex. B, was delivered to plaintiff 2, who sues on it.

I agree therefore that plaintiff No. 1 has no charge on the property sold for the Rs. 6,000 now in question but that plaintiff 2 is entitled to a personal decree against defendant for the amount due under the promissory note, Ex. B, and that, as she is willing that the decree be made in favour of plaintiff No. 1, it should be so made. The Subordinate Judge has made only an ordinary mortgage decree for sale in favour of plaintiff. That should be set aside and a personal decree made against defendant in favour of plaintiff No. 1 in its stead with costs in the Lower Court. I agree that in this Court each party should bear his own costs.

A. S. V. ——— *Decree modified.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE VENKATASUBBA RAO AND MR. JUSTICE REILLY.

R. M. Raman Chettiar ... *Appellant** (*Plaintiff*)

v.

Tirugnanasambandam Pillai, late a minor but now declared a major, *vide* Order dated 18th July, 1924 on C. M. P. No. 3300 of 1923 and others ... *Respondents.*

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Guardians and Wards Act, S. 29—Alienation by guardian—Order sanctioning—Effect—Alienation by way of sale—Mortgage—Distinction—S. 31 (2)—Recital of necessity for alienation—Absence of, in order sanctioning alienation—Validity of order—Effect on.

When an order of the Court has been made, under S. 29 of the Guardians and Wards Act, authorising the guardian of an infant to make an alienation of the infant's estate, the alienee is entitled to trust to that order and is not bound to enquire as to the expediency or necessity of the alienation for the benefit of the infant's estate. The order affords the alienee complete protection and the alienation must be upheld unless the alienee has been a party to a fraud or collusion or has been guilty of an underhand dealing. The effect of the order sanctioning the alienation is not merely to shift the onus of proof. *Venkataswami* v. *Viranna,* (1921) I L R 45 M 429: 42 M L J 333 dissented from.

There is no difference, as regards the effect of the order granting sanction, between the case of a sale and that of a mortgage.

Where two of the items of consideration for a mortgage of an infant's estate made by his guardian with the sanction of the Court obtained under S. 29 of the Guardians and Wards Act represented loans previously advanced to the guardian on his own responsibility, but it appeared that the Court sanctioned the mortgage with full knowledge of that fact, *held,* that the mortgage was valid even as regards those items.

The absence, in an order sanctioning a mortgage under S. 29 of the Guardians and Wards Act, of a specific recital of the necessity which the Court found for the mortgage, does not render the order invalid, if it appears that the necessity was clearly set out in the affidavits or the petitions which were before the Court when it accorded sanction.

Appeal against the decree of the Court of the Subordinate Judge of Tuticorin in O. S. No. 66 of 1921.

The Advocate-General and *E. Vinayaka Rao* for appellant.

S. Muthiah Mudaliar, P. N. Marthandam Pillai and *A. C. Shanmuga Nainar* for respondents.

The Court delivered the following

JUDGMENTS :—*Venkatasubba Rao, J.* :—The question to be decided in this appeal has reference to the validity of a mortgage bond executed by the guardian of the minor defend-

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*Appeal No. 71 of 1923. 29th July, 1926.

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ant. The plaintiff claimed about Rs. 8,000 in his plaint, but the learned Subordinate Judge disallowed some items and passed a decree for Rs. 3,000 odd. The plaintiff has filed the present appeal.

In the District Court of Tinnevelly, O. P. No. 41 of 1914 was filed by one Muthiah Pillai, the brother-in-law of the defendant, for the purpose of getting a guardian appointed, under the Guardians and Wards Act, of the person and property of the defendant, who was then about 12 years of age. Among the respondents to that petition were Subramania Pillai and Satyanada Pillai, whose names alone are important having regard to the facts with which we have to deal. The defendant was the adopted son of one Manickavasagam Pillai who had died previous to the petition and Subramania and Satyanada were the defendant's brothers in his natural family. In September, 1914, an order was made by the Court appointing Subramania the defendant's guardian under the Act. In August, 1915, Subramania applied to the District Court under the same Act for permission to borrow Rs. 4,000 on the security of immoveable property of the minor. Certain affidavits were filed in support of that application and after notice to all the parties to the petition, the Judge granted on the 24th September, 1915, permission to execute a mortgage deed and raise the sum mentioned. The draft of the proposed bond was submitted to the Court and it was approved; the engrossed bond was then produced and seen by the Court. It was directed to be registered and after registration it was again produced before the Court and there the matter ended. I may remark that the learned Judge also sanctioned the compound interest provided for in the bond, the mortgage bond having deviated in this respect from the affidavits filed. The record of what took place in the District Court shows very clearly that not only were the terms generally approved of by the District Judge but that the actual bond itself was perused by him and received his sanction.

The mortgage deed is dated 29th September, 1915, and is marked Ex. C. The consideration is made up of six items:

(1) Rs. 751-6-11 due to the plaintiff in respect of a promissory note, dated 29th December, 1913, Ex. C-1;

(2) Rs. 987-12-9 due to the plaintiff in respect of a promissory note, dated 12th February, 1914, Ex. C-3.

(3) Rs. 611-6-1 due to the plaintiff in respect of a promissory note, dated 10th March, 1914, Ex. C-5.

(4) Rs. 606-6-3 due to the plaintiff in respect of a promissory note, dated 6th April, 1914, Ex. C-6.

(5) Rs. 1,037-7-3, amount retained with the mortgagee for payment to Satyanada. This amount represents the principal of Rs. 875 borrowed by Subramania between 21st January, 1914 and 13th March, 1914 from Satyanada and interest thereon. This is not covered by any bond.

(6) Rs. 5-8-9, amount received in cash from the mortgagee. Total Rs. 4,000-0-0.

The particulars set forth above show that excepting the trifling sum of Rs. 5 odd, the balance had been borrowed by Subramania previous to his appointment as guardian. This is a very important fact. Another very material fact is that the first four sums had been borrowed from the plaintiff himself. These two circumstances have an important bearing upon the issue to be decided in this case. The evidence in the case disclosed that Subramania was acting as the minor's *de facto* guardian before his appointment by the District Court. On the 14th of April, 1914, he filed in the guardianship petition a statement of account (Ex. 2) showing his dealings with the minor's estate. On that date he had not been appointed guardian but for all practical purposes he treated himself as the guardian of the minor. In reciting the particulars of the consideration I have mentioned four promissory notes. Of these, Exs. C-5 and C-6 (items 3 and 4) were executed by Subramania *describing himself as the defendant's guardian*. The other two promissory notes Exs. C-1 and C-2 (items 1 and 2) were executed by Subramania *in his personal capacity*. This is an important point of difference and the learned Subordinate Judge has found for the plaintiff to the extent of the amounts covered by Exs. C-5 and C-6. The rest of the claim has been disallowed on the ground that the amounts which go to make up the balance of the consideration was not proved to have been borrowed for the minor's benefit.

I shall now consider the evidence in regard to each of the items, 1, 2 and 5 and state my conclusions.

I shall first take item 5, Rs. 1,037-7-3. In dealing with this item, the learned Judge has based his finding on conjectured opinion ignoring proved facts and positive evidence. P. W. 1, the plaintiff's agent, and P. W. 2, Subramania himself, support the plaintiff by giving direct evidence on the point. Shortly after the mortgage bond was executed, Subramania and Satyanada called at the plaintiff's place and the money was paid to

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Satyanada on 2nd November, 1915, in accordance with the directions in the bond. Satyanada then passed a receipt in the name of Subramania (Ex. C-7) and the latter made an endorsement upon it and handed it to the plaintiff. The account-books of the plaintiff confirm this version. We have looked at these books and there is not the slightest suspicion attaching to them. The learned Judge has given no valid reasons for rejecting this evidence but has acted on mere suspicion and, as I have said, on speculative reasoning. The fact that Ex. C-7 was made out in the name of Subramania and not in the name of the plaintiff is said to be suspicious. I am unable to follow this argument. The next fact against the plaintiff is said to be that Satyanada himself owed some money to the plaintiff on the date in question and that it was not likely that the plaintiff would make a payment to a person from whom money was due. This reasoning is, however, opposed to the learned Judge's finding that he believes that the plaintiff made a payment but that it was made to Subramania and not to Satyanada. If the plaintiff was prepared to pay the amount what did it matter to whom he paid it? Great reliance is placed by the defence upon Ex. 7. It is a small sheet of paper containing some pencil entries. I must state a few introductory facts to explain this exhibit. The defendant was married in August, 1919. In 1921 Subramania was removed from guardianship and one Kumaravelu, the defendant's father-in-law, was substituted as his guardian in the place of Subramania. I may add that Kumaravelu is the defendant's guardian *ad litem* in this suit. The retiring guardian handed certain papers belonging to the minor's estate to Muthuswami, D. W. 3. The latter is a pleader and the father-in-law of Kumaravelu. It is said that Ex. 7 was discovered among the bundle of papers so handed. The defence relies upon the first item in Ex. 7. It is alleged that it shows that Satyanada had been paid off on the 7th April, 1915, long before the date of the mortgage itself. If this case is true, it follows that the payment spoken to by the plaintiff is false. The very foundation of the learned Judge's argument has been shown to be unsound. The entry does not show that the debt incurred by Subramania on behalf of the minor was paid off. It shows just the contrary that that amount was expressly reserved for future payment. Muthuswami, D. W. 3, says in his evidence that he had heard from Satyanada himself that the amount due to him had been previously paid off. Still, we find that this Satyanada has not

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been examined. D. W. 3 professes to have heard this about the year 1919. If this was true, one would expect a reference to this incident in Ex. H-1, dated 1st August, 1921. Although the defendant's liability is disputed in general terms, no specific reference was made to the amount having been previously paid off. The matter does not rest here. In his written statement filed on the 7th January, 1922, this particular allegation was not made. Then in regard to Ex. 7 Muthuswami deposes that he discovered it a month after the written statement was filed. This story is improbable. Granting that Ex. 7 was discovered only after the written statement was filed, there is no sufficient reason given for failing to file it in Court on the date fixed by the Court for the filing of documents. But what we really find is, that no one hears of this document till practically Subramania was in the witness-box, and then, it, for the first time, sees the light of day. The whole story regarding this Ex. 7 seems extremely suspicious and the learned Judge has completely failed to appreciate this aspect of the case. There is still another very important factor which has not been noticed by the Judge. In Ex. E (a statement of account filed by Subramania in the guardianship petition on the 31st of March, 1916) there is a specific entry of payment of interest on this sum due to Satyanada. If the principal had been already paid off it is impossible to conceive that interest was subsequently paid.

I shall now pass on to item 1. On 13th October, 1913, Subramania borrowed from the plaintiff Rs. 300 under the promissory note (Ex. C-2). On 29th December, 1913 Subramania borrowed a further sum from the plaintiff and gave a consolidated promissory note for Rs. 600 (Ex. C-1).

The particulars of item 2 may also be briefly set forth. On the 1st May, 1913, Subramania borrowed Rs. 600 from the plaintiff and executed in his favour a promissory note (Ex. C-4). Subramania borrowed again from the plaintiff a further sum of money on 12th February, 1914, and executed a consolidated promissory note for Rs. 800 (Ex. C-3).

I gather from the judgment of the Lower Court that these two sums were disallowed on the ground that in executing the promissory notes Subramania did not describe himself as the minor's guardian, and that this fact was sufficient to give the plaintiff notice, when he took the mortgage bond, that these amounts were not utilised for the minor's benefit.

I have discussed the evidence at some length in order to show that although some vague charges have been made against

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the plaintiff, there is no proof of either fraud, collusion or any other kind of underhand dealing on his part. Indeed no attempt has been made to substantiate any such charges.

On these facts, is the plaintiff not entitled to a decree for the whole amount claimed ? The ordinary rule of law is that the purchaser should establish the validity of the alienation by showing either that it was made for a purpose binding upon the minor or that he (the purchaser) acted with due care and caution after making reasonable enquiry. [*See Hanuman Pershad's case* (1)]. What then is the effect of a sanction given under the Guardians and Wards Act? By S.29 of that Act the guardian is forbidden to enter into certain transactions without the previous permission of the Court. S.30 enacts that a disposal of immoveable property in contravention of S. 29 is voidable at the instance of the minor S. 31 lays down that the permission shall not be granted except in case of necessity or for an evident advantage to the ward. Under S. 47 an appeal lies to the High Court from an order of a District Court refusing permission to a guardian to do an act under S. 29. The effect of S. 48 is that an order granting permission under S. 29, if not set aside in revision by the High Court, is final and cannot be contested by a suit or otherwise.

What is the effect then of an alienation by a guardian made with the sanction of the Court? The answer is to be found in the judgment of their Lordships of the Privy Council in *Gangapershad Sahu* v. *Maharani Bibi* (2). This is what they say:—

"Their Lordships think that, when an order of the Court has been made authorising the guardian of an infant to raise a loan on the security of the infant's estate, the lender of the money is entitled to trust to that order, and that he is not bound to enquire as to the expediency or necessity of the loan for the benefit of the infant's estate. If any fraud or underhand dealing is brought home to him that would be a different matter; but, apart from any charge of that kind, their Lordships think he is entitled to rest upon the order."

Their Lordships then proceed to remark

"It is sufficient for the plaintiff to say 'I have got the order of the Court'."

These words are clear and unequivocal. Let us look at the reason of the thing. The Legislature has cast upon the Court the duty of enquiring whether the transaction is beneficial to the minor. No sanction can be granted unless the Court is satisfied that it is. The lender or the purchaser is no longer harassed by doubts as to the character of the transaction. He looks at the order authorising the mortgage or

1. (1856) 6 M I A. 393. 2. (1884) I L R 11 C 379 (P C).

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the sale. An order of a competent Court is produced to him and is he not entitled to act upon it? The very object of the sections to which I have referred is to safeguard the interests of the minor. A transaction is not authorised unless the Court comes to the conclusion that it is for his benefit. From the point of view of the guardian again, if he honestly and frankly tells the Court the circumstances which has led to his application he will have performed his duty and as he does not trust to his own judgment but to the judgment of the Court, he can rely upon the sanction in any proceedings that may be taken at some future time against him. From the point of view of the purchaser, his title to the property stands on a better footing than if there had been no sanction, as the question of the beneficial nature of the transaction cannot be re-opened. This incidentally benefits the minor, as a fair price can be obtained for his property. I understand this to be the principle underlying the sections to which I have referred and the decision of the Privy Council unambiguously declares that this is the effect of those sections. It is quite a different matter, of course, if the alienee is proved to be a party to any fraud or collusion and the proposition contained in the judgment of the Privy Council is made expressly subject to this reservation. If further authority is needed for this position, I need only refer to *Rameshwar Singh* v. *Dhanpat Singh* (3) and *Akhil Chandra Saha* v. *Girish Chandra Saha* (4). But the defendant relies strongly upon a case of this Court in *Venkatasami* v. *Viranna* (5) decided by Spencer and Ramesam, JJ. In that case it has been held that the effect of the sanction is merely to shift the onus of proof; whereas, ordinarily it is for the alienee to show that the transaction is binding, the burden is, where the sanction has been obtained, upon the minor to show that the transaction is not binding. Spencer, J., relies upon *Sikher Chund* v. *Dulputty Singh* (6) and *Jugal Kishori Chowdhurani* v. *Anunda Lal Chowdhurani* (7). As regards the former of these two cases it is sufficient to say that it was decided before the Privy Council in *Gangapershad Sahu* v. *Maharani Bibi* (2). Apart from that, the observations of Garth, C. J., in *Sikher Chund* v. *Dulputty Singh* (6) show that he understood the law as interpreted subsequently by the Judicial Committee. Though some observations in

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2. (1884) I L R 11 C 379 (P C). 3. (1909) 5 I C 334.
4. (1917) 21 C W N 864.
5. (1921) I L R 45 M 429: 42 M L J 333.
6. (1879) I L R 5 C 363. 7. (1895) I L R 22 C 545.

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his judgment may give apparent support to the contention of the defendants, the judgment taken as a whole cannot be regarded as an authority in their favour. In regard to *Jugal Kishori Chowdhurani* v. *Anunda Lal Chowdhurani* (7), the second case relied on by Spencer, J., it must be noticed that it is a case of specific performance of a contract where entirely different considerations would apply. Although the contract may have been sanctioned under the Guardians and Wards Act, so long as it has not been actually carried out, it is certainly open to the Court to examine, when a suit is brought for that purpose, whether it will be to the advantage of the minor that it should be specifically enforced. Spencer, J.'s judgment, it must be noticed, does not refer to the Privy Council decision. So far as Ramesam, J.'s decision is concerned, that learned Judge distinguishes the Privy Council case on the ground that it relates to a mortgage, whereas the case with which he was dealing relates to a sale. With the utmost deference, this fact, in my opinion, does not in principle make any difference.

I am disposed to hold, differing from *Venkatasami* v. v. *Viranna* (5) that where an alienation has been made with the sanction of the Court, the alienee can rely upon it and the alienation must be upheld unless the alienee has been a party to a fraud or collusion or has been guilty of any underhand dealing.

Applying this rule, I have no hesitation in deciding that the plaintiff is entitled to a decree for the full amount claimed It only remains for me to say a word in regard to items 1 and 2. The promissory notes, as I have said, were executed by Subramania in his personal capacity and not as the minor's guardian. At their inception, therefore, these debts were the personal debts of Subramania. The plaintiff was not thus called upon when the debts were incurred to make any enquiries regarding any benefit or advantage accruing to the minor. When the mortgage was taken, the plaintiff in regard to these debts was in the position not of the minor's creditor but of a stranger. He was then shown the sanction and what meaning did it convey to him. It may be described in some such words—

"A certain sum had been raised by Subramania acting for himself from the plaintiff. Subramania was able to convince the Court that this sum had been spent for the benefit of the minor. The Court being so convinced, has, by the order of sanction, authorised Subramania to reimburse himself to that extent and for that purpose to borrow on behalf of the minor an amount from the plaintiff."

5. (1921) I L R 45 M 429: 42 M L J 333. 7. (1895) I L R 22 C 545.

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This is the effect of the sanction order and the plaintiff was perfectly justified in trusting to and acting upon that sanction.

Looking at the case from this point of view, it is immaterial whether it has or has not been made out that the sums were actually raised or utilised for the minor's benefit or for purposes binding upon him. I express no opinion as regards Subramania's liability to the minor. Whether he misled the Court or not when he obtained the sanction is a question with which we are not concerned. It cannot be denied that he was not as frank as he might have been in the affidavits filed in support of his application for sanction. But that is a question entirely foreign to the present enquiry.

There is one further point which remains to be noticed. It has been contended by the defendant that the sanction obtained is not valid as it does not recite, as required by S. 29, the necessity for the loan. In my opinion, this defect is nothing more than a mere irregularity and does not render the sanction invalid. As has been pointed out in *Rameshwar Singh* v. *Dhanpat Singh* (3) the Court must be treated as having adopted the grounds set forth in the petition and the affidavits and although the grounds are not reproduced in the order, the clear effect is to base the order upon those grounds. The fact that the grounds are not specifically referred to in that order cannot make it invalid. *Buddhoo* alias *Gulab Dass* v. *Sheo Charan* (8) takes the same view. This contention, therefore, is overruled.

In the result, the decree of the Lower Court is modified and there shall be a mortgage decree in favour of the plaintiff for the entire amount claimed in the plaint with interest as provided for in the mortgage bond and costs throughout. Time for redemption is three months.

Reilly, J.

Reilly, J.:—I agree. If a man takes a mortgage on the property of a minor for whom no guardian has been appointed or declared under the Guardians and Wards Act, what is required of him before he can succeed in a suit on his mortgage? It is sufficient if he shows that he acted in good faith and that he satisfied himself by reasonable inquiry that the advance was required for the necessities or for the clear benefit of the minor. If a man proposing to take a mortgage on the property of a minor finds in the course of his inquiries that a guardian has been appointed under the Guardians and Wards Act and that

3. (1909) 5 I C 354. 8. (1924) 22 A L J 851.

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Reilly, J.

that guardian has obtained the sanction of the District Judge for the proposed mortgage, what further inquiry are we to require of him? The minor in such a case is a ward of the Court, and the duty of the District Judge to guard the minor's interests is higher, far higher, than the mortgagee's. Is the mortgagee to sit in judgment on the order of the District Court and to inquire whether that order was made upon sufficient grounds? I think such a position would be entirely unreasonable, and for that view we have the very highest authority. I venture to repeat the words which my learned brother has quoted in his judgment from *Gangapershad Sahu v. Maharani Bibi* (2).

> "Their Lordships think that, when an order of the Court has been made authorising the guardian of an infant to raise a loan on the security of the infant's estate, the lender of the money is entitled to trust to that order, and that he is not bound to inquire as to the expediency or necessity of the loan for the benefit of the infant's estate."

Now that is perfectly plain and unequivocal, and it is not suggested that the new Guardians and Wards Act has made any change in the law since that pronouncement. Our attention has been drawn to the fact that there is a case of this Court in which the principle of that decision of the Privy Council was not strictly followed. That is *Venkatasami v Viranna* (5). It is true that this Madras case was one of a sale while the case before the Privy Council was one of a mortgage; but I find it difficult to see that there is any real distinction in principle in this matter between a sale and a mortgage. With very great respect I find it impossible to follow the decision of the learned Judges in *Venkatasami v. Viranna* (5) so far as it is to the effect that the sanction of the District Judge in such a case is not a complete protection to an alienee who acts in good faith, saving him from the necessity of pressing his inquiries further. In his judgment Spencer, J. does not mention this very important decision of the Privy Council, and I gather that the other learned Judge, Ramesam, J., though he refers to the Privy Council decision would have hesitated to depart from it if the case before him had been one of a mortgage. I may mention that Mr. Muthiah Mudaliar for the defendant has stated explicitly before us that he does not suggest that the plaintiff in this case was a party to any fraud in obtaining the sanction of the District Judge.

2. (1884) I L R 11 C 379 (P C).
5. (1921) I L R 45 M 429: 42 M L J 333.

There is one peculiarity of this case to which I must refer. It appears that part of the consideration for the mortgage now in question was not money advanced directly to the guardian for the minor's estate but money which had been advanced long before the date of the mortgage to the guardian himself on his own responsibility without any reference to the minor's estate. If a mortgagee, in whose case the District Judge has sanctioned the mortgage of a minor's property for a certain amount, instead of advancing that amount to the guardian sets off part of it against a debt incurred already by the guardian on his own responsibility and not as guardian, then in an ordinary case there will be a very heavy burden on the mortgagee to show that he acted in good faith and that he really pursued inquiries sufficiently far to satisfy him that that debt was one for which the minor's estate was ultimately liable. Fortunately for the plaintiff in this case we cannot require him to discharge any such burden in respect of the two items of consideration representing loans to the guardian on his own responsibility, because it appears that the facts regarding those two loans were placed before the District Judge. Those items of consideration are fully described with the information that they represent loans taken by the guardian on his own responsibility in the mortgage deed itself, and the records show that the draft of the mortgage deed was laid before the District Judge and approved by him, a procedure which is not always adopted when the District Judge sanctions mortgages in such cases. The plaintiff, it appears to me therefore, is entirely protected in this case from any such necessity of pushing his inquiries behind the District Judge's sanction or showing that he acted in good faith in adjusting those loans, which had been made to the guardian personally, against the mortgage amount. I may add that it has been urged before us that the District Judge's order sanctioning the loan was invalid, because it did not recite the necessity which he found for the mortgage as required by S. 31 (2) of the Guardians and Wards Act. In regard to that all that I think necessary to say is that it has been decided in *Rameshwar Singh* v. *Dhanpat Singh* (3) and *Buddhoo* alias *Gulab Dass* v. *Sheo Charan* (8) that, even where the District Judge does not recite the necessity specifically in his order of sanction, if the record shows that the affidavits or the petitions before him set out the necessity clearly and he says "Sanction granted" or words to this

3 (1909) 5 I C 334. 8. (1924) 22 A L J 851.

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effect, we may read into his order the necessities and reasons alleged and presume that he adopted them. In this case there is no reason whatever to suppose that the District Judge did not inquire into the matter as carefully as was necessary and apply his mind to it and adopt the reasons and necessities alleged before him in the affidavits filed in the matter.

I agree that the appeal must succeed and that orders should be made as proposed by my learned brother.

A. S. V. *Appeal allowed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE DEVADOSS AND MR. JUSTICE WALLACE.

P. M. A. Vellayappa Chetti and others .. *Appellants* (2nd defendant's legal representatives)*

v.

Subramaniam Chettiar and others .. *Respondents (Plaintiffs 1 and 2 and defendants 1, 3 and 4).*

Vellayappa Chetti v. Subramaniam Chettiar.

Madras Estates Land Act (I of 1908), S. 3 (4) (a) and (f)—"Improvements"—Cocoanut plantations, whether improvements—"Planting of fruit trees and fruit gardens"—Planting of cocoanuts whether amount to.

Small pits which are dug when cocoanut seedlings are planted and which are euphemistically known as wells from which water is baled out are not "improvements" within the meaning of S. 3 (4) (a) of the Madras Estates Land Act, as it cannot be said, in the absence of evidence to that effect, that the market value of the holding has gone up appreciably in consequence of the making of these pits.

The planting of cocoanuts cannot be said to be "planting of fruit trees and fruit gardens" within the meaning of S. 3 (4) (f) of the Madras Estates Land Act.

Per Wallace, J.—The expression "planting of fruit trees" must mean some exceptional or unusual crop, a change from the usual routine of crops, the planting of something more valuable than usual and therefore a kind of crop which is not in the ordinary sense a crop usually cultivated as a crop.

Second appeals against the decrees of the District Court of Ramnad at Madura in A. S. Nos. 975, 976 and 977 of 1920 and A. S. Nos. 378, 391 and 392 of 1921 preferred against the decrees of the Court of the Special Deputy Collector of Ramnad at Manamadura in S. S. Nos. 2580, 2582 and 2617 of 1918 and S. S. Nos. 1638, 1558 and 1660 of 1920.

*S A Nos. 435 to 438 of 1924. 2nd September, 1926.

Vellayappa Chetti v. Subramaniam Chettiar.

M. Patanjali Sastri and *C. S. Rama Rao Saheb* for appellants.

B. Sitarama Rao and *V. Ramaswami Aiyar* for respondents.

The Court delivered the following

Devadoss, J.

JUDGMENTS :—*Devadoss, J.* :—In this batch of second appeals the appellants are the ryots. The landholder brought suits under S. 77 of Act I of 1908, the Madras Estates Land Act, for arrears of rent for certain faslis. The appellants contended that the rent claimed in respect of cocoanut plantations was more than the rent they were bound to pay and that they were liable to pay only at the punja rate. Both the Lower Courts found against the contentions of the appellants. Two points are raised in these appeals. The first is, that the cocoanut plantation in respect of which the alleged higher rent is claimed is an improvement within the meaning of S. 3 (4) of the Act and the second is that the cocoanut plantations come within cl. (*f*) of the same sub-section. Both the Courts have found that the wells were dug at the cost of a few annas, and the digging of such wells was not an improvement within the meaning of S. 11 (4). The evidence is that two coolies working till noon could dig a well. The soil is sandy and the water is almost within a foot or two from the surface. When cocoanut seedlings are planted, small pits are dug which are euphemistically known as wells and water is baled out from these wells. The cocoanut seedlings require water for about 5 or 6 years after plantation. The appellants' contention is that the sinking of these wells is an improvement within S. 3, cl. 4 of the Act. Cl. 4 is in these terms:

"Improvement means with reference to the ryot's holding any work which materially adds to the value of the holding, etc."

The question is whether these wells have materially added to the value of the holding. The water of each pit is said to be sufficient to water 60 or 70 plants and twigs of tamarind trees and cotton stocks are placed round the wells so as to prevent the earth or the sand from falling in. The real test of the improvement is the rise in value of the holding by reason of the improvement. Could it be said that by having a few pits here and there in a field, the cost of digging which is not more than eight annas, the value of the holding would be enhanced? It is impossible to hold that these pits would in any way enhance the value of the holding. The soil itself being sandy it is fit for cocoanut plantation. It is not by digging wells alone that the appellants have been able to grow cocoa-

Vellayappa Chetti v. Subramaniam Chettiar.

Devadoss, J.

nut plantations. The case would be different if the wells are dug and crops which would not thrive but for the water of the well have been raised. Wells are something more than mere pits which could be dug by a cooly within one hour or two hours or as it is done in some places by removing the sand with the feet. It cannot be said that small pits one or two feet deep for the purpose of baling water would enhance the value of the holding. Reliance is placed by Mr. Patanjali Sastri on the observation of a Bench of this Court in S. A. No. 571 of 1916.

The learned Judges observe :

"We can see no reason to restrict the meaning of improvement to a permanent improvement, for temporary improvements can materially enhance the value of the holding for the period during which they are in existence."

On looking into the papers in that case it appears that the District Judge found that there was no improvement as the wells were sunk at a trifling cost. In paragraph 3 he says:

"His claim has been rightly disallowed even though it may be that the wells in question being temporary pits sunk at a trifling cost are not 'improvements' within the meaning of the term as defined in the Act, S. 3 (4) since they do not materially add to the value of the holding."

The learned Judges observe:

"As regards the charge for Vanpayir the Judge finds in S. A. No. 169 of 1917 that the temporary wells by aid of which the crops were grown are improvements within the meaning of S. 13 (3) of the Estates Land Act. We accept this finding and would apply it also in the other cases in which no such finding is given, for we can see no reason to restrict the meaning of improvement to a permanent improvement, for temporary improvements can materially enhance the value of the holding for the period during which they are in existence."

It is difficult to understand how they considered the finding of the District Judge as one of improvement when he definitely found that they were not improvements as they did not materially enhance the value of the holding. In this case it cannot be said that these wells have in any way added to the value of the lands in the possession of the appellants.

It is next contended that cocoanut trees are fruit trees within the meaning of cl. (*f*) of S. 3 (4). The clause is 'planting of fruit trees and fruit gardens'. What are fruit trees is not easy to define. The ordinary meaning of a fruit tree is a tree cultivated for its fruit. The question is, is the cocoanut palm a fruit tree? No doubt the cocoanut is used for various purposes. But can it be called a fruit tree, as is meant in cl. (*f*)? A fruit tree is a tree the fruit of which is edible as such; every tree which bears fruit cannot

be called a fruit tree. It is well known that in several parts of the country cocoanut palms are grown not for the sake of the fruit but for tapping them for toddy and so is the palmyra palm in the Southern Districts of this Presidency. Where the tree is not grown for its fruit to be used as such it would not be right to hold that tree is a fruit tree. With some hesitation we hold that the cocoanut palm is not a fruit tree within the meaning of cl. (*f*) of sub-section 4 of S. 3.

In this view it is unnecessary to consider at length the contention of Mr. Sitarama Rao for the respondents that the assessment or the rent of the land in this estate is on the basis of the crops and there is no such thing as punja rate. We are unable to accept this contention. Lands are classified as *Nanja* and *Punja* and there are certain well-known crops which are punja crops and the mere fact that some crops are charged at a certain rate would not be sufficient to uphold the contention that there is no such thing as punja rate. The patta produced in this case and the oral evidence go to show that there is a well-recognised rate as punja rate. Even punja is classified in this estate as Thiruvapathu punja and Varapathu punja. It is unnecessary to discuss this question any further. The defendants not having made out the rent which they have to pay for the cocoanut plantations they are not entitled to any relief. In the result the second appeals fail and they are dismissed with costs.

S. A. Nos. 435 *and* 436 *of* 1924. *Wallace, J.* :—I agree and only wish to add my own reasons on the two chief points.

Wallace, J.

As regards the question whether the pits dug are an improvement, it has to be noted that an 'improvement' means something which "materially adds to the value of the holding". Now this is a point on which we cannot speculate. It ought to be a matter of evidence, and I can find no evidence thereon. The sort of evidence one would expect would be evidence of persons who consider that the market value of the holding has gone up appreciably in consequence of the making of these pits, and who would therefore be prepared to pay appreciably more for the holding after the pits were made than before they were made. But of this sort of evidence there is none. I agree therefore with my learned brother that we cannot find these pits are an improvement within the meaning of S. 3(4) (*a*) of the Madras Estates Land Act.

The next point is whether the planting of cocoanuts is a planting of fruit trees and fruit gardens within the meaning

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of S. 3 (4) (*f*). "Fruit" of course is a most elastic term and can be applied to include berries (even coffee berries) or nuts, crab apples or tomatoes, beans or pepper corns, pumpkins or plantations, and even grains and pulses. Nothing can be gathered from the 'dictionary' meaning of the word as to its meaning in this definition, and we have to try and gather otherwise what the Legislature meant. I think that it must at least have meant some exceptional or unusual crop, a change from the usual routine of crops, the planting of something more valuable than usual and therefore a kind of crop which is not in the ordinary sense a crop usually cultivated as a crop. Now I cannot regard cocoanuts as such a crop. Over large tracts of country in this Presidency it is the normal crop; in parts the only crop suited to the soil. I do not imagine that the Legislature intended that the planting of a normal crop should be styled an improvement. That it is regarded as a normal crop in the locality from which the suits arise is clear from the pattas filed, which show that areas deliberately grown with cocoanuts are charged per area although isolated trees probably growing on bunds, etc., are charged per tree. This at least is the explanation of the (patta) sentences given by the respondent, and I am not prepared to say that it is wrong. I therefore agree with my learned brother that, as at present advised, we cannot say that the planting of cocoanuts on the suit lands is an improvement within the meaning of S.3 (4) (*f*).

N. S. *Second Appeals dismissed.*

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